SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 113

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER

VS.

WESTERN UNION TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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R.S. 5263 & 4 grant certain rights of way on Military post roads &c &c

R.S. 5266 says "Telegrams between the several departments of the Government and their officers & agents ... shall have priority over all other business at such rates as the P.M.G. shall annually fix" =

Govt. rates have been paid without prejudice to the Claim for enough to make up Commercial rates.

The Black Corp. was created by Act 29 July 76. 39 S.T. 28. The Shipping Bd has all the stock, paid for by U.S. - The Bd may sell any or all but shall not be a running holder

The Corp. is empowered broadly to operate ships.

In U.S. v Strang 254 U.S. - held (1) Agt of Corp not agt of U.S. (2) Agt of Stockholders not agent of Shareholders - (3) Inspector for Corp was not indictable under 41 Cr Code

Buchanan v U.S. 256 U.S. 363 held that Baggage porter was not agent of U.S. during federal control ~~[illegible]~~ under §39. - Not officer or or acting for or for U.S.

Sloan Ship. Yards Corp. v U.S. 258/574 held W Corp had powers of corporation liable on contract for work: Not in all cases immune to private suit. (2) Claim in tort may not entitled to preference as a Claim of the U.S.

"

Planters' Bank vs Georgia 9 Wheat 904 ~~[illegible]~~ jurisdiction. ~~[illegible]~~ This was a Ga Corp. The State was a member - "When a govt becomes a partner in a trading Corp. it descends - divests itself of its sovereign character. Hall vs His 103/5. - Cont of employment by His forfeit 'per' them repealed etc can held liable. S.C. v U.S. 199/437 - Held State liable for int' rev' tax. The state having gone into liquor business -

Govt says.

1. E.F. Corp was acting as agent of a dept of the Govt within the meaning of the act. RS. 5266.

(W Shipping Bd is Defl. Concedes that the Corp is not strictly a Defl. Nor does it claim that the Corp. is a broad agency, an adjutancy agency or instrumentality of the Govt, it is entitled to Govt rates on the Corp's account. In this case record shows Corp was not acting in Corp Capacity but as an agent of the Shipping Board. Corp conformed to all directions of Shipping Bd.

Brf 17

(4) Activities of Govt Govt in character - In any event D.1. is entitled to rates paid out of the Treasury without regard to what the activities were. The contention is broadly that even if the activities were commercial & not governmental the Corp is entitled to Govt rates.

(C) Rate apply to telegrams to & from outside points.

the 60 days!

(a). Combining by the Corp to directions of the Bd is immaterial ① Messages were of the Sep 30. 21. (2) there are three per. July 1917 to June 1, 1920. from ② to Sep 30 21. reconstruct - ③ after the resolution of Sep 30, 1921 - peacetime = The Corp is controlled by shareholders function in a Corp Capacity, Par 11 of Stipulation shows the business was corporate not governmental

(b) Rel bet U.S. & Corp is stockholding. merely

Note! Regarding the Pork Road as a contract, the court will direct the surrounding circumstances. Did the parties intend to have govt rate apply to messages sent & received by not by emps officers or employes of the the Govt, but by the agts officers & employees of a Corp created for commercial & business purposes and as an instrumentality to aid the development of ~~trade~~ to ocean transportation of American commerce?

Court of Appeals of the District of Columbia.

No. 4322.

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

a Supreme Court of the District of Columbia.

At Law.

No. 67088.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,

vs.

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed October 23, 1922.

In the Supreme Court of the District of Columbia.

At Law.

No. 67088.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,

vs.

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant.

1. The plaintiff, The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State

of New York, sues the defendant, The United States Shipping Board Emergency Fleet Corporation, a corporation of the District of Columbia, for that the plaintiff at the times of the happening of the matters and things hereinafter set forth and for a long time prior thereto was engaged in the business of transmitting messages by telegraph in, to and from the District of Columbia, the several States of the United States, and elsewhere, and charged for said services fixed sums of money or tariffs established and made the legal and uniform rates in conformity with the Act of Congress known as The Interstate Commerce Act and amendments thereto, and the usual and legal rates applicable to messages were dependent upon the points of origin and destination of said messages, the number of words therein contained, and the class of service; that heretofore the defendant requested the plaintiff to perform services for it in transmitting and delivering messages and agreed to pay to the plaintiff the plaintiff's established and legal charges therefor at the end of each and every calendar month in respect of the messages
2 in respect of which services had been so performed during the month, and upon said request and agreement the plaintiff performed services for the defendant; that during the month of June, 1922, the plaintiff performed services as aforesaid upon which the charges aforesaid amounted to the sum of one thousand, nine hundred and thirty-one dollars and four cents; that during the month of July, 1922, the plaintiff performed services as aforesaid upon which the charges aforesaid amounted to the sum of five hundred and five dollars and ninety-five cents; that the plaintiff has demanded of the defendant payment of the amounts due as aforesaid aggregating two thousand four hundred and thirty-six dollars and ninety-nine cents, yet the said defendant has not paid the said sum or any part thereof; wherefore the plaintiff brings this suit and claims the sum of two thousand four hundred and thirty-six dollars and ninety-nine cents, with interest on one thousand nine hundred and thirty-one dollars and four cents from the first day of July, 1922, and interest on two thousand four hundred and thirty-six dollars and ninety-nine cents from the first day of August, 1922, besides costs.

2. The plaintiff, the Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York, sues the defendant, The United States Shipping Board Emergency Fleet Corporation, a corporation of the District of Columbia, for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the
3 defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them, and the plaintiff claims the sum of two thousand four hundred and thirty-six dollars and ninety-nine cents, with interest on one thousand, nine hundred and thirty-one dollars and four cents from the first day of July, 1922, and interest on two thousand four hundred

and thirty-six dollars and ninety-nine cents from the first day of August, 1922, according to the particulars of demand hereto annexed, besides costs.

WILSON, HUIDEKOPER & LESH,
Attorneys for Plaintiff.

4 *Particulars of Demand.*

* * * * * * *

The United States Shipping Board, Emergency Fleet Corporation to the Western Union Telegraph Company, Dr.

To services performed by the plaintiff at the request of the defendant in transmitting and delivering messages at the usual, established and legal rates, during the months of June and July, 1922, said messages being some of them filed for transmission and the other of them received at Washington, District of Columbia, on the dates, to the destinations or from the points of origin, signed by the agents of the defendant and charged for in the amounts, respectively, set out in the following schedule, amounting in the aggregate to two thousand four hundred and thirty-six dollars and ninety-nine cents, of which one thousand and nine hundred and thirty-one dollars and four cents accrued during the month of June, 1922, and was due, and interest is claimed from the first day of July, 1922, and of which five hundred and five dollars and ninety-five cents accrued during the month of July, 1922, and was due, and interest is claimed from the first day of August, 1922:

5 The Western Union Telegraph Company, Incorporated.

Western Union Telegraph and Cable.

Bills are payable not later than 10th of each month. All checks should be drawn to the order of the Western Union Telegraph Company and mailed to the Company.

U. S. Shipping Board Emergency Fleet Corpn.

Date: Washn., D. C., June, 1922.

If you pay by check please detach this coupon and mail with check, *retaining the bill for your records.* Receipt of check remittances will be acknowledged only when specifically requested, since paid checks returned by banks constitute full receipts for such payments.

Amount $—.

Detach here.

To the Western Union Telegraph Company, Incorporated, Dr.

Amount.	Date.	Name of point.	Total.
1 20	1 Summers	To San Fran	
2 31	.... Relyea	"	
4 09	.... Carl	"	
1 20	.... Jacobsen	"	
3 24	.... Minor	"	
2 31	.... Boyer	"	
1 97	.... Dranga	"	
15 48	.... Georg	"	
2 31	.... Dranga	"	
2 05	.... Dangers	"	
3 36	.... Meisenbach	Alameda	
3 41	.... Saint	S Pedro	
81	.... Ames	Chgo	
30	.... Carson	Balto	
1 99	.... N A & W SS Co	To Bostn	
95	.... Hay	St Louis	
90	.... Easton	Rutland	
2 22	.... Tex Abnk & T	Galveston	
84	.... Clinchfd Nav	N Y	
36	.... Lowe	"	
3 49	.... Gunelach A	N Y	
44	.... Craig	N Y	
60	.... Dillingham	N Orl	
60	.... "	"	
74	.... S Cruz	N Orl	
64	.... Thomas	"	
4 42	.... S Cruz S B	"	
12 08	.... Journal Comm	Seattle	
10 55	.... Semmes	Seattle	
7 75	.... "	"	
1 04	.... Haag	Tacoma	
1 20	.... Snow	Portld	
8 17	.... Relyea	Portld	
2 39	.... Richardson	"	
10 81	.... "	"	
8 43	.... Relyea	"	
6			
4 09	2 Dranga	San Fran	
2 39	.... Cotton	"	
2 73	.... Relyea	"	
4 86	.... Young	"	
5 37	.... Relyea	"	
1 29	.... Meisenbach	Alameda	
2 90	.... Meisenbach	"	
1 29	.... "	"	
1 63	.... "	"	
36	.... McLane	Hoboken	

Amount.	Date.	Name of point.	Total.
1 67	.... Windward I L	Mobile	.....
92	.... Churchill	Novn Scotia.....	.....
7 15	.... Snow	Portld	.....
1 20	.... Crichton	Portld	.....
1 20	.... Baird	"	.....
1 20	.... Haag	Tacoma	.....
	Fwd		164 81

NOTE.—The following twenty-two pages omitted per designation of record.

Summary of Schedule.

1922, June.	Domestic	$1,563.39	
	Foreign	367.65	$1,931.04
" July	Domestic	.....	505.95
	Total		$2,436.99

WILSON, HUDEKOPER & LESH,
Attorneys for Plaintiff.

7 *Agreed Statement of Facts.*

Filed September 3, 1924.

* * * * * * *

The plaintiff, The Western Union Telegraph Company (hereinafter called the Telegraph Company), and the defendant, the United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation) hereby mutually agree and stipulate upon and to the following statements of fact, both parties, however, reserving respectively all possible objections as to the relevancy, competency, or materiality of the several facts so agreed to be true or any of them, with like effect as though objection had been made and exception noted:

1. The Telegraph Company is a corporation organized under the laws of the State of New York and continuously existing since and before June 8, 1867, and was such Corporation at all times pertinent to this cause.

2. The Fleet Corporation is a Corporation organized April 16, 1917, and existing under the laws of the District of Columbia, and was such Corporation at all times pertinent to this cause.

3. The Telegraph Company throughout its existence has been and is engaged in the business of transmitting messages by telegraph in, to and from the District of Columbia, and in, to and from the several States of the United States, the District of Columbia, the possessions of the United States and foreign countries.

4. The Telegraph Company charges, and at all times pertinent hereto did charge, for transmitting messages by telegraph for the public generally, legal and uniform rates, in conformity with the Act of the Congress of the United States known as the Inter-
8 state Commerce Act and amendments thereto. These rates have depended and still depend upon the points of origin and destination of the messages, the number of words therein and the class of message, such as telegram, day letter, night message or night letter. To messages known as (United States) "Government" messages, the "Government" rate is and at all times material hereto has been applied, with the accompanying right of priority over all other business in their transmission as distinguished from the messages of and rates thereon to the public generally, herein called "commercial" messages and rates.

5. The Government rates upon domestic telegrams are fixed annually by the Postmaster General of the United States, pursuant to Section 2 of the Act of Congress approved July 24, 1866, entitled "An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes", 14 Stat. 221, and have been so fixed annually since the approval of that Act. The rates so fixed have obtained and do obtain for a fiscal year, beginning on July 1st of any given year, and terminating on June 30th of the following year. The Government rates for and to prevail throughout the fiscal years July 1, 1921 to June 30 1922, and July 1, 1922 to June 30, 1923, were fixed by the Postmaster General of the United States on July 1st 1921, and July 1st, 1922, respectively, by Orders numbered 6155 and 7813, respectively. Copies of said Orders are hereto attached, marked respectively Exhibits "A" and "B" and made part hereof, being incorporated by reference as fully as though set out in the body of this agreed statement of facts. These respective Orders cover in fact the periods (June, 1922 and July, 1922) in question in this cause. The Government rates in the said Orders established are as to domestic telegrams in general terms forty (40) per centum of the legal commercial rates, subject, however, to certain modifications set forth in the said Orders. The Government rates as to cablegrams are fifty (50) per centum of the commercial
9 rates.

6. The Telegraph Company, on June 8, 1867, pursuant to a resolution of its board of directors, duly filed with the then Postmaster General of the United States, as contemplated by Section 4 of the aforesaid Act of Congress of July 24, 1866, its written acceptance of the restrictions and obligations imposed and required by the said Act for the exercise by it of the rights, powers and privileges extended to and conferred upon acceptors by the said Act. A certified copy of the said acceptance is hereto annexed, made part hereof, and marked Exhibit "B-1".

7. The statement in the declaration that the messages therein referred to were transmitted and delivered by the Telegraph Company for and at the request of the Fleet Corporation is true in fact, and the computation of the amount of charge which is or

would be due therefor at the commercial rate is correct, except that the enumeration of messages set forth in the particulars of demand annexed to the declaration herein and the charges in respect to said messages are subject to these corrections that certain items therein should be charged against others than the Fleet Corporation, and certain other items are duplicate charges, and therefore there should be eliminated from the June, 1922, domestic bill, charges totaling the sum of $4.67, and from the July, 1922, domestic bill, charges totaling $3.02.

The charges at the Government rate upon the messages set forth in the said particulars of demand, after making the eliminations last referred to, are as follows: for the month of June, 1922, domestic, $636.15; June, 1922, cable $180.87; July, 1922, domestic, $204.69.

8. Since the filing of the declaration herein, and on or about January 25, 1923, the Fleet Corporation has paid to the Telegraph Company the charges aforesaid at the Government rate, without prejudice to the contentions of either party hereto, and pursuant to a certain agreement and stipulation dated and entered into between the parties on October 19, 1922, which is attached hereto as Exhibit "C" and to be read as a part hereof.

That by reason of the eliminations in the last numbered
10 paragraph mentioned, and the payment in the next foregoing paragraph referred to, the present suit stands as a claim for the unpaid difference between the Government rate and the commercial rate on the aforesaid messages, that is, for $1,407.59, with interest on $1,109.35, from July 1, 1922, and interest on $298.24 from August 1, 1922.

The items going to make up this modified claim are set forth in the following schedule:

	On messages set out in particulars of demand		On messages now agreed upon per audited bill		Difference claimed and due if commercial rate applicable
Period 1922	Commercial rate	Govt. rate	Commercial rate	Govt. rate	
June					
Domestic	$1,563.39	$638.04	$1,558.72	$636.15	$922.57
Cable	367.65	180.87	367.65	180.87	186.78
July					
Domestic	505.95	206.50	502.93	204.69	298.24

Of the messages involved in this action, (1) some were messages pertaining to the operations of the Fleet Corporation and which passed between it and its officers and agents, in its behalf, or between it and its officers and agents in its behalf and the officers and agents of some branch of the Government, and (2) some were messages also pertaining to its operations, and which passed between it and it officers and agents in its behalf, on the one hand, and persons, firms or corporations which were not its officers or agents or those of any branch of the Government on the other hand. On messages of the first mentioned class, the tolls calculated at commercial rates amount

to $1,846.77, and at Government rates to $775.61. On the messages of the second mentioned class, the tolls calculated at commercial rates amount to $582.53, and at Government rates to $246.10.

9. The Fleet Corporation was caused by the United States Shipping Board to be organized pursuant to Section 11 of the Shipping Act of September 7, 1916, under Sub-Chapter 4 of Chapter 18 of the Code of Law for the District of Columbia, by certificate of incorporation filed in the office of the Recorder of Deeds, District of Columbia,
April 16, 1917, and recorded in Liber 33, folio 272, et seq., of
11 the corporation records of the District of Columbia. A copy of said certificate of incorporation is attached hereto as Exhibit "D" and to be read as a part hereof. On August 8, 1917, said certificate of incorporation was duly amended in the manner provided by the laws of the District of Columbia by the filing in the office of the said Recorder of Deeds of a certificate recorded in Liber 33 at folio 371, of which a copy is hereto annexed, marked Exhibit "D-1" and to be read as a part hereof. All of the incorporators of the Fleet Corporation at and prior to the time of its incorporation were either officers or employees of the United States Shipping Board and were requested by the Chairman of the Board to act in that capacity pursuant to resolutions duly adopted by the Board on April 14, 1917 copies of which are hereto attached and made a part hereof and marked Exhibits "D-2" and "D-3" respectively.

10. Acting under authority of sundry Acts of Congress conferring upon him certain powers enumerated therein respectively the President of the United States issued his four certain Executive Orders bearing date July 11, 1917, June 18, 1918, December 3, 1918, and August 11, 1919, respectively, said Orders being numbered 2664, 2888, 3018, and 3145, respectively, and all of which may be referred to for all purposes pertinent to this cause as though fully copied herein.

On September 23, 1919, the Shipping Board passed the following resolution:

"Whereas, The President has by Executive order dated August 11, 1919, directed the United States Shipping Board to exercise all powers and authority vested in him in reference to the disposition of materials or plants as defined under the emergency shipping fund provision of the Deficiency Appropriation Act, approved June 15, 1917, acquired by the United States Shipping Board Emergency Fleet Corporation, and has further directed said Board in its discretion to sell, lease, or otherwise dispose of such materials and plants, or any portions or parts thereof, and that such sales, leases or other disposition shall be made directly by said Board, or by it, in its discretion through the United States Shipping Board Emergency Fleet Corporation, or through any other Corporation organized by it for such purpose.

12 "Resolved, That the Board do hereby direct that all sales, leases or other disposition of materials or plants, as above defined, or any portions or parts thereof, which it is empowered to make as aforesaid, shall be made through the United States Shipping

Board Emergency Fleet Corporation, by public or private sale or contract, with or without notice, in such lots, at such times and places, upon such credit, security and other terms, or conditions, and in such manner generally as said Corporation, from time to time, shall deem to the best advantage of the United States, and that the said Corporation shall have power to do all such acts and things and to execute all such deeds, leases, bills of sale and/or other instruments as in the judgment of the officers executing the same shall be necessary or desirable to carry out the purposes of this Resolution.

"Further resolved, That all acts heretofore done by said Corporation with reference to such sales, leases or other disposition, and which could have been properly done by said Board, be and the same are hereby ratified, approved and confirmed."

The Fleet Corporation from the respective dates upon which the aforesaid Executive Orders were issued did in fact exercise the powers delegated to it by said Orders and continued so to do until June 5, 1920 when the Act known as the Merchant Marine Act of 1920 was approved and took effect. Thereby the Acts of Congress, herein referred to, under which the President was authorized to delegate the powers originally vested in him thereby, and under which he made his four executive orders above referred to, were repealed.

After June 5, 1920, on which day the Merchant Marine Act was approved, and until September 30, 1921, on which day the resolution hereinafter referred to as Exhibit "E-1" was adopted by the Shipping Board, the Fleet Corporation pursued activities and engaged in operations of the following general character:

(1) It operated certain ships and assigned others for operation to managing and operating agents.

(2) On June 9, 1920, the Shipping Board duly adopted a resolution in the words and figures following:

"Resolved, That the power and authority relating to the rights and liabilities of the Emergency Fleet Corporation vested in the Shipping Board by sub-section 'c' of Section 2 of the Merchant Marine Act approved June 5, 1920, be exercised by the Shipping Board through and by the United States Shipping Board Emergency Fleet Corporation, to which is hereby delegated the exercise of such power and authority, in accordance with Section 35 of the above mentioned act."

On July 15, 1920, the Board of Trustees of the Fleet Corporation duly adopted a resolution in the words and figures following:

"Whereas, By resolution adopted on June 9, 1920, the Shipping Board delegated to the Emergency Fleet Corporation the power and authority vested in the Shipping Board by sub-section (c) of Section 2, of the Merchant Marine Act, 1920;

"Resolved, That the Construction Claims Board be and it is hereby, authorized and directed to exercise on behalf of the Board

of Trustees, and subject to the direction thereof, the power and authority delegated to the Emergency Fleet Corporation by said resolution of the Shipping Board."

That the Fleet Corporation through its Construction Claims Board which had been created on January 30, 1920, by order of a Vice-President of the Fleet Corporation, adjusted, settled and liquidated matters arising out of or incident to the actions taken under the four Executive Orders hereinbefore referred to, until November 18, 1920, when the said resolution of the Shipping Board was terminated and superseded by another resolution duly adopted by the Board on the latter date in the words and figures following:

"Resolved, That the Board of Trustees of the United States Shipping Board Emergency Fleet Corporation be, and it is hereby, authorized, empowered and directed to examine, and confirm, modify or reject, all findings of fact made by the Construction Claims Board upon claims submitted to that Board, and to present to the United States Shipping Board in final and complete form the disposition of each of said claims which said Board of Trustees shall determine upon, for the approval of the said United States Shipping Board."

From and after November 18, 1920, the Board of Trustees of the Emergency Fleet Corporation examined, confirmed, modified or rejected findings of fact of said Construction Claims Board
14 and presented said claims to the Shipping Board in accordance with said resolution of that date, until the Construction Claims Board was abolished on the 29th day of July, 1921.

The duties of the Construction Claims Board during its existence were to investigate and make findings regarding the just compensation to be paid whenever any contract was cancelled, modified, suspended or requisitioned or whenever any plant or part thereof or any ship charter or material, was made use of, assumed, acquired, occupied or taken over, in accordance with the Emergency Shipping Fund Provisions of the Urgent Deficiencies Appropriation Act approved June 15, 1917, as amended. When the Construction Claims Board was abolished on July 29, 1921, it was superseded by a body known as the Claims Commission, which was created by the Shipping Board by a resolution duly adopted on August 24, 1921, and made effective as of July 29, 1921, which resolution is in the words and figures following:

Resolved, 1. That pursuant to the powers and duties conferred and imposed by the Merchant Marine Act of 1920 upon the United States Shipping Board to adjust, settle and liquidate and to determine the amount of just compensation with reference to certain claims, there is hereby created a Commission to be known as the Claims Commission of the United States Shipping Board to be composed of a Chairman and four other Commissioners appointed by the United States Shipping Board. Such Commission shall have power to make and alter rules and regulations governing its own procedure

and the manner of presenting claims, and, subject to the prior approval of the Shipping Board, to appoint necessary assistants and employees, at salaries to be first approved by the Board, and shall have the authority herein set forth. Such Commission shall be composed of Walter D. Meals, Chairman, Arthur W. Teele, Frederick W. Wood, P. M. Watt and Homer L. Ferguson. Oliver P. M. Brown shall be the Secretary of the Commission.

2. In any case where the United States Shipping Board is authorized to adjust, settle or liquidate any claim (except a claim by a foreign government) now existing against the United States or the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation in connection with or incidental to the construction of any ship or ships, dry dock, wharf or terminal facilities, housing or transportation facilities or with respect to any other matter which may be referred to it by the Shipping Board, the said Claims Commission is hereby authorized on behalf of the United States Shipping Board to adjust, settle and determine the same.

3. The Claims Commission is hereby authorized to determine the amount of just compensation in any case (other than one presented by a foreign government) where such amount has not heretofore been determined according to law and where

(*a*) The United States shall have cancelled, modified, or suspended any contract or made use of, assumed, occupied, requisitioned, acquired or taken over any plant or part thereof or any ship, charter or material, or

(*b*) The President shall have requisitioned or assumed the control of any dry dock, wharf, lighterage system, or loading or discharging terminal facilities in any part of the United States or any warehouse equipment or terminal railway connected therewith, or

(*c*) The President shall have taken possession of, leased or assumed control of, and street railroad, interurban railroad or part thereof wherever operated or any cars, appurtenances, franchises, or parts thereof commonly used in connection with the operation thereof necessary for the transfer and transportation of employees of shipyards or plants engaged in the construction of ships or equipment therefor for the United States, or

(*d*) The United States Shipping Board Emergency Fleet Corporation shall have requisitioned or condemned any improved or unimproved land or any interest therein suitable for the construction thereon of houses for the use of employees and the families of employees of shipyards in which ships were being constructed for the United States, or shall have requisitioned or condemned any houses or other buildings for the use of such employees and their families together with the land on which they were erected or any interest therein, any necessary and proper fixtures or furnishings therefor or any necessary conveniences or facilities incidental thereto.

4. In case any adjustment or settlement or any determination as to just compensation which shall be made by the Claims Commission shall be agreed to by the claimant, the Commission shall report the same to the United States Shipping Board for approval, confir-

mation, modification or rejection. No payment upon any such adjustment, settlement, determination or agreement shall be made except from funds duly appropriated by Congress and available for such purpose.

5. The Construction Claims Board heretofore appointed by virtue of various general orders and resolutions is hereby abolished and the personnel thereof is hereby transferred to the Law Division.

6. This resolution shall be effective as of July 29, 1921."

That the said Claims Commission from and after its creation continued to function pursuant to the foregoing resolution, until September 30, 1921 and thereafter.

16 (3) On June 24, 1920, the Shipping Board duly adopted a resolution in the words and figures following:

"Resolved, That under the provisions of Sections 13 and 35 of the Merchant Marine Act, 1920, the Emergency Fleet Corporation be, and it is hereby, authorized to create a Division of Transportation and Housing Operations in charge of a manager reporting to the President of said Corporation, which Division shall have charge of the maintenance, operation and/or disposition of any housing projects or transportation systems owned or controlled by the Emergency Fleet Corporation, subject to such directions as may be given by the Shipping Board."

The Board of Trustees of the Fleet Corporation on June 24, 1920, duly adopted resolutions in the words and figures following:

Resolved, That effective July 1, 1920, the Passenger Transportation and Housing Division shall be known as the Division of Transportation and Housing Operations. This Division shall be in charge of a Manager reporting to the President of the Emergency Fleet Corporation.

Resolved further, That the Manager's Department shall establish a definite sales policy subject to the approval of the Board and when established, negotiate and close sales thereunder and be responsible for the preparation of mortgages and all legal instruments in connection therewith and their delivery to the Treasurer.

Resolved further, That the Manager's Department shall be responsible for the maintenance or operation of any owned or controlled project or transportation system.

Resolved further, That the responsibility for the collection of all accounts, including rents, installments, etc., shall be delegated to the Treasurer and for the keeping of accounting records and matters pertaining to the proper financial control of the Transportation and owned Housing projects or for projects not owned shall be delegated to the General Comptroller.

Resolved further, That in the instance of Realty Companies the capital stock of which is owned by the Fleet Corporation, that representatives of each of the departments interested, viz., Manager, General Comptroller and Treasurer, shall be elected to the respective Boards of Directors.

Resolved further, That in the instance of Realty Companies the capital stock of which is not owned by the Fleet Corporation, that representatives of the Manager's Department shall approve all applications for expenditures of funds of the said Realty Companies and that financial control of the accounts specified in the mortgage agreements relating to the said Realty Companies, shall be obtained by the General Comptroller through monthly reports and statements to be furnished by the Realty Companies.

Resolved further, That should the Realty Companies, the capital stock of which is not owned by the Fleet Corporation, request that the accounts of these companies be kept by the Fleet Corporation, the General Comptroller will keep these accounts, billing the respective Realty Company for the expenses in connection therewith.

17 "Resolved further, That all salaries and expenses of the Division of Transportation and Housing Operations including the salaries and expenses of the Manager's Department, the Treasurer's Department, and the General Comptroller's Department relating directly thereto and all operating and maintenance expenses in connection with projects owned by the Fleet Corporation, shall be paid from funds collected from the operation and sale of these projects."

That the said Division of Transportation and Housing Operations of the Fleet Corporation from June 24, 1920, to September 30, 1921, acted upon the foregoing resolutions and carried them into effect by exercising the power and authority conferred thereby.

(4) Sold and disposed of large quantities of ship construction material located in the various shipyards and concentration yards throughout the country, which material had become surplus and was not required for ship construction purposes after the ship construction program had been abandoned, which necessitated the suspension and cancellation by the Fleet Corporation of a large number of shipbuilding contracts. The Fleet Corporation had, during this period, as a part of its organization, a regularly organized Supply and Sales Division, composed of numerous of its representatives, at the head of which was a director, and which conducted the sales of the surplus and salvage materials above referred to. All of the funds realized from the sales of the property and material hereinbefore referred to were deposited in the United States Treasury to the credit of the Fleet Corporation and subject to its draft.

(5) Sold and disposed of large quantities of securities, consisting chiefly of promissory notes secured by mortgages, and deposited the funds realized from the sales thereof in the United States Treasury to the credit of the Fleet Corporation and subject to its draft.

(6) In general, pursued a policy of liquidating all property and assets held and controlled by it, both real and personal, (except ships), acquired during the war and deemed unnecessary in its operations following the close of the war, and after converting such property and assets into money, the money,

18

in all cases when received, was deposited in the United States Treasury to the credit of the Fleet Corporation and subject to its draft.

(7) Participated, through its legal representatives, in many receiverships and bankruptcy proceedings in various tribunals throughout the country to the end that the interests committed to it by the law and by reason of the facts herein elsewhere appearing should be protected.

11. During the period when the messages involved in this suit were sent and at all times subsequent thereto the Fleet Corporation operations have been exclusively the following: The management, operation, maintenance, repair and reconditioning of vessels; the establishment and operation of lines and routes of vessels; the completion or conclusion of construction work upon vessels; the sale of vessels; the operation and sale of housing projects, real estate, railroad and other similar property; the operation and sale of dry docks; the custody and sale of other property and materials; matters of accounting; insurance and matters pertaining to the same the operation of pier and pier facilities; the disbursement and expenditure of all moneys arising out of operations, and of funds allotted to it from appropriations by Congress; the leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and for its terminal facilities; matters incidental to the foregoing, including the employment, compensation and removal of officers and employees, and in doing the foregoing the Fleet Corporation has at all times since September 30, 1921, and until January 10, 1924 conformed to the directions with regard thereto contained in the resolution of the United States Shipping Board adopted September 30, 1921, and since January 10, 1924, to those contained in the resolutions adopted that day by the said Board,
19 copies of which resolutions are hereto attached marked Exhibits "E-1" and "E-2" respectively, and to be read and considered as parts hereof.

12. The Fleet Corporation did in fact exercise the power and authority vested in it by the President in his Executive Orders dated July 11, 1917, June 18, 1918, and December 3, 1918. It constructed many vessels with moneys derived by it as set out in paragraph 14 hereof. The construction contracts in all cases provided that title to the completed vessels should be in the United States, and that the title to material assembled for the furtherance of work or set up in the shipyards should be in the Fleet Corporation, which was described in the recitals of said contract as "representing the United States of America." The Shipping Board on October 12, 1917, sent to all owners of ships enrolled under the laws of the United States, a notice effective October 15, 1917, at noon, of which copy is attached hereto and marked Exhibit "F," requisitioning said ships pursuant to Executive Order dated July 11, 1917. The Fleet Corporation on August 3, 1917, sent to the owners of American Shipyards where many other vessels were in process of construction a notice of which copy is hereto attached and marked Exhibit "G", requisitioning said vessels pursuant to the Executive Order dated July 11, 1917, and completed the construction of the

said vessels with the aforesaid moneys. By two Executive Orders dated June 30, 1917 and July 3, 1917, issued by the President under the authority of a Joint Resolution of Congress approved May 12, 1917, 40 Stat. 75, is was in substance ordered that through the Shipping Board there should be taken over to the United States the possession and title of a large number of vessels within its jurisdiction owned in whole or in part by any corporation, citizen or subject of any nation with which the United States was then at war. Pursuant to these Executive Orders many vessels owned by corporations, citizens and subjects of the German Empire were seized by the United States through the Shipping Board and thereafter
20 manned, equipped and operated directly by the Board, or, in accordance with its directions by the Fleet Corporation. An Act of Congress, approved March 4, 1921, 41 Stat. 1382, provided that, after its approval, no contract should be entered into or work undertaken for the construction of any additional vessels for the United States Shipping Board or the Fleet Corporation, and since that date no contracts have been entered into, and no further vessels have been constructed by the Fleet Corporation.

13. Of the fifty million dollars of capital stock of the Emergency Fleet Corporation, divided into five hundred thousand shares of one hundred dollars each, the "United States Shipping Board on behalf of the United States", subscribed for 499,993, and the seven individuals who were (as appears from the certificate of incorporation) named as the first trustees, subscribed for one share each. A stock subscription list showing these facts and a certificate by the Secretary of the Treasury to the effect that there was on deposit in the Treasury, to the credit of the trustees, the sum of fifty million dollars, were exhibited to the Recorder of Deeds at the time the original certificate was filed. No payments were made for capital stock by anyone other than the United States through said Shipping Board, and a total of fifty million dollars was so paid. On the first day of May, 1918, a certificate to the effect that the whole amount of the capital stock as subscribed for, fifty million dollars, had been fully paid in, was made, verified and dated that day by the President and a majority of the trustees of said Fleet Corporation, and filed with the Recorder of Deeds and recorded in Liber 34 of folio 222 of said Incorporation Record, a copy of which is hereto attached and marked Exhibit "H".

Certificates of stock were issued to the original subscribers in accordance with their respective subscriptions, that is to say, certificates aggregating 499,993 shares to "United States Shipping Board on behalf of the United States of America", and a certificate for
21 one share to each of the seven individual subscribers to enable him to qualify as a trustee of the Fleet Corporation. At the time of the issue of the said seven individual certificates, each was endorsed with an assignment to the United States Shipping Board signed by the individual subscribers respectively, and left in the stock book in the custody of the Secretary of the United States Shipping Board.

Original individual subscribers have, from time to time, resigned as trustees, and successors have been appointed and qualified as

trustees by the issue in the name of the successor of each resigning trustee of a separate certificate for one share, without any payment therefor by successor trustees, which has in each case been similarly endorsed to the United States Shipping Board and has remained in the custody of the Secretary of the Shipping Board.

All money paid to the Fleet Corporation for its aforesaid capital stock was from an appropriation of fifty million dollars from the Treasury of the United States derived from the sale of Panama Canal bonds by the Secretary of the Treasury, as directed by Section 13 of the Shipping Act of 1916.

14. All property acquired by, or the legal title to which became vested in, the Fleet Corporation has been exclusively the following:

The Fifty Million Dollars ($50,000,000) appropriated and paid for its capital stock as aforesaid, the sums of money subsequently appropriated by Congress as appears from the several Acts appropriating the same, and property acquired by the expenditure thereof, and the proceeds of the sale and the revenues derived from the use of the property so acquired.

The Fleet Corporation has always considered that its holdings of such property and its functioning were always on behalf of the United States, and that no private purpose was to be served by it thereby.

22 15. That the organization of the Fleet Corporation for the transaction of its affairs is and at all times material hereto has been substantially as follows:

At Washington:

A board of seven trustees, a President and other Executive officers;

A division in charge of a Vice-President, consisting of a Department of Maintenance and Repair, a Fuel Department, a Department of Purchases and Supplies and a Construction Department;

A division in charge of a Director of Traffic consisting of an Advertising Department, a Marine Insurance Department, and an Inland Offices Division;

A division directly in charge of the President, consisting of a Contract and Allocations Department, a Chartering Department (at New York), an Administrative Department, a Statistical Department and a Secretary's office;

A division in charge of the Director of Finance, consisting of the Comptroller's Department, the Treasury and Disbursing Office and the Collection Department;

A division in charge of the General Counsels consisting of a Legal Department, an Admiralty Division, and a Department of Claims;

The field organization outside of Washington consisting of—

Foreign offices other than European, that is in Lagos, West Africa, St. Thomas, the Virgin Islands; Rio de Janeiro, Buenos Aires, Shanghai and Hong Kong, China; Yokohama, Japan; Manila, The Philippine Islands; Honolulu, Hawaii; Tampico, Mexico; and Balboa, Canal Zone.

European districts with headquarters at London and other offices in Rotterdam, Marseilles and Constantinople.

The North Atlantic District with headquarters at New York and other offices in Boston and Philadelphia.

The Baltimore District, with headquarters in Baltimore.

The Hampton Roads District with headquarters at Norfolk.

23 The South Atlantic District with a district office at Savannah and other offices at Charleston and Jacksonville.

The Gulf District with headquarters at New Orleans and other offices at Pensacola, Mobile and Galveston.

The Pacific Coast District with headquarters at San Francisco and other offices at Portland, Oregon, and Los Angeles, and

The Puget Sound District with headquarters at Seattle, Washington.

16. From and since the time of the organization of the Fleet Corporation, the Telegraph Company has customarily accepted for transmission over its wires telegraphic messages from the Fleet Corporation, first, upon a form headed as follows: "Official Telegram U. S. Shipping Board"; then on a form bearing the imprint "Official Telegram, United States Shipping Board Emergency Fleet Corporation, Official Business, Government"; and thereafter from June 23, 1920 (including June, 1922 and July, 1922) upon a form bearing the following caption:

Original—for Dispatch.

Official Telegram—Government Rate.

United States Shipping Board Emergency Fleet Corporation

Dispatch the following immediately via:

(a) U. S. S. B. E. F. C. private wire.
(b) Western Union.
(c) Postal.

Forwarded for dispatch from (City:) ——, (State:) ——, at —— a. m.
—— p. m.
Approved for dispatch by —— ——, (Designation:) ——.
(Month:) ——, (Day:) ——, (Year:) ——.

The Telegraph Company had, during said periods, also accepted and transmitted messages of the Fleet Corporation on the form provided for commercial rate messages, bearing, however, additional words importing that they be sent at the Government rate.

24 The form most generally used in the legal commercial-rate practice was captioned as follows:

Western Union Telegram.

Class of service desired: Telegram, Day Letter, Night Message, Night Letter.

Patrons should mark an X opposite the class of service desired; otherwise the message will be transmitted as a full-rate telegram.
Receiver's No.: —; Check: —; Time filed: ——.

NEWCOMB CARLTON,
President.
GEORGE W. E. ATKINS,
1st V. P.

There appeared in the center of the immediately foregoing caption the figure of a globe, circumscribed by a band, wherein appeared the words "Telegram and Cable". Across the globe appeared a band, bearing the words "Western Union". Though the form last described is that ordinarily supplied to the public and most generally used for commercial rate business, the Telegraph Company accepts for transmission at the commercial rate messages written on any sort of a form or on blank paper or transmitted by telephone, provided only the message is one which in accordance with law and the established rates should be transmitted at commercial rates.

The three forms first described or quoted in this paragraph were the ones prepared by and on behalf of the Fleet Corporation for its use, and were the ones on which its messages were most generally written and accepted for transmission. When the form provided by the Telegraph Company for its commercial rate business was used by the agents of the Fleet Corporation, some words were customarily written on the form to indicate that the message was to be sent at the Government rate, and continuously from the time of the organization of the Fleet Corporation until May 23, 1922, the Telegraph Company accepted all messages of the Fleet Corporation and charged for their transmission at the Government rate and gave them priority over commercial messages in transmission without questioning that the Fleet Corporation was entitled to the benefit of that rate with the right of priority in transmission. On or about the date last mentioned, the Telegraph Company caused a communication to be sent to the Fleet Corporation for the first time denying the applicability of the Government rate to all Fleet Corporation messages, and giving notice that the commercial rates would be thereafter applied to such messages.

Of the messages involved in this suit, the ones of which copies are annexed to this stipulation as "Exhibit I," 1 to 19, inclusive, and to be read as a part hereof, are typical. All messages were sent out by the Fleet Corporation and paid for with funds derived by it as set forth in paragraph 14 hereof in connection with its operations as herein set forth.

17. The Telegraph Company has, continuously from the date of its acceptance of the restrictions and obligations and of the rights, powers and privileges set forth in paragraph 6 of this agreed statement of facts, extended to those Executive Departments headed by what is known as a Cabinet Officer, the Government rates for telegraphic messages with the right of priority in transmission thereof as set forth in paragraph 5 of this agreed statement of facts, and has also extended the said Government rate with the right of

priority in transmission to the telegraphic communications of the following (with the exception with regard to the Fleet Corporation elsewhere stated herein):

Interstate Commerce Commission.
United States Shipping Board. United States Shipping Board Emergency Fleet Corporation.
Federal Power Commission.
War Finance Corporation.
United States R. R. Administration.
Railroad Labor Board.
The Panama Canal.
The Federal Reserve Board.
The Federal Trade Commission.
United States Tariff Commission.
General Accounting Office.
Alien Property Custodian.
Civil Service Commission.
U. S. Bureau of Efficiency.
U. S. Employees' Compensation Commission.
Pan American Union.
Smithsonian Institution.
Inter-American High Commission—U. S. Sec.
Natl. Home for Disabled Volunteer Soldiers.
Government of the District of Columbia.
Veterans' Bureau.
Federal Board for Vocational Education.
U. S. Interdepartmental Social Hygiene Board.

26 18. And the Telegraph Company, has, from the date of its said acceptance of the restrictions and obligations, and of the rights, powers and privileges set forth in paragraph 6 of this agreed statement of facts, also extended the said Government rates as set forth in paragraphs 4 and 5 of this agreed statement of facts to the Judicial Branch of the United States Government, and to the Legislative Branch thereof.

19. On July 10, 1873, the then Attorney General of the United States, by opinion transmitted to the then Postmaster General of the United States, rendered the decision which is reported in 14 Opinions of the Attorneys General, at p. 278, which opinion is to be read as and considered a part hereof as though set out at large herein and the quotation in said opinion from a letter dated June 20, 1873 from the President of the Telegraph Company to the Postmaster General is correct. The Telegraph Company has permitted the extension of the Government rate to the bodies hereinbefore in numbered paragraph 17 enumerated, upon application for the said Government rate made by them or on their behalf, as a matter of course, and without litigation in the courts or other final determination of the legality of the claims for Government rates. In agreeing that no final determination has been made, however, the parties do not intend to countervail such facts herein elsewhere appearing, if any, to which might be applied the rule of practical construction.

20. In addition to the facts hereinbefore recited and agreed upon, all facts of which the court may take judicial notice, shall be considered as being included in and forming a part of this statement.

FRANCIS R. STACK,
PAUL E. LESH,
Attorneys for Plaintiff.
E. M. ALLISON, Jr.,
GEOFFREY GOLDSMITH,
CHAUNCEY G. PARKER,
Attorneys for Defendant.

Dated August 30, 1924.

27 EXHIBIT "A"

Rates of Pay for Communications by Telegraph

Order No. 6155

Post Office Department,
Washington, D. C., July 1, 1921.

Pursuant to the authority vested in the Postmaster General by the act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 24, 1866," and by the Revised Statutes of the United States, Title LXV, I hereby fix the rates at which such communications as the said statutes prescribe (not including those passing over circuits established by the Chief of the Weather Bureau, Department of Agriculture) shall be sent during the fiscal year beginning July 1, 1921, and terminating June 30, 1922, by the several companies within the effect of said statutes, as follows:

All messages shall be subject in all respects to the prevailing commercial count of chargeable words, and the address and signature of domestic messages shall be transmitted free in accordance with the commercial practice.

For day messages the charge shall be forty (40) per centum of the charge for a full-rate commercial telegram of the same length between the same points in the United States. The minimum charge for any day message shall be twenty-five (25) cents.

For day letters, night messages, and night letters the charge shall be forty (40) per centum of the charge for a commercial day letter, night message, or night letter, as the case may be, of the same length, between the same points in the United States. The minimum charge for any night message shall be twenty (20) cents; for any night letter thirty (30) cents; and for any day letter, forty-five (45) cents, except that the rate charged for a Government day letter or night letter shall not in any case exceed the amount charged for a commercial day letter or night letter of the same length between the same points.

For the purpose of determining the charges above provided, the charge for the transmission of a commercial message of the same class and length and between the same points should first be ascertained and the Government rate should then be computed at forty (40) per centum of the commercial charge so ascertained.

In cases where the charge for a Government message, thus determined, shall include a fraction of a cent, such fraction, if less than one-half, is to be disregarded; if one-half or more, it is to be counted as one (1) cent.

In cases where the message in transit to destination passes over the lines of two or more connecting companies subject to this order each such company shall receive for its share of the transmission within the United States the above-designated percentage of its portion of the established through tolls to destination if to a point in the United States, or to the border if the destination is in Canada or Mexico.

In the case of messages from the United States to points in Canada or Mexico, the above-designated percentages shall apply with respect to the transmission within the United States, the basis being the appropriate prevailing commercial rate between the point of origin in the United States and the border.

All Government cable messages take the prevailing commercial cable count through, from point of origin to destination. The Western Union and the Commercial Companies charge one-half the normal cable rate at cable count for trans-Atlantic transmission of the United States Government messages over their cables. The rate for the inland transmission within the United States of Government cable messages to or from all foreign countries, except Mexico, the normal connection with which is by cable, shall be one-half the inland zone word rate charged on commercial cablegrams between the same points.

* * * * * * *

28 WILL H. HAYS,
Postmaster General.

29 EXHIBIT "B"

Rates of Pay for Communications by Telegraph

Order No. 7813

Post Office Department,
Washington, D. C., July 1, 1922.

Pursuant to the authority vested in the Postmaster General by the act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and by the Revised Statutes of the United States, Title LXV, I hereby fix the rates at which such communications as the said statutes pre-

scribe (not including those passing over circuits established by the Chief of the Weather Bureau, Department of Agriculture) shall be sent during the fiscal year beginning July 1, 1922, and terminating June 30, 1923, by the several companies within the effect of said statutes, as follows:

All messages shall be subject in all respects to the prevailing commercial count of chargeable words, and the address and signature of domestic messages shall be transmitted free in accordance with the commercial practice.

For day messages the charge shall be forty (40) per centum of the charge for a full-rate commercial telegram of the same length between the same points in the United States. The minimum charge for any day message shall be twenty-five (25) cents.

For day letters, night messages, and night letters the charge shall be forty (40) per centum of the charge for a commercial day letter, night message, or night letter, as the case may be, of the same length, between the same points in the United States. The minimum charge for any night message shall be twenty (20) cents; for any night letter, thirty (30) cents; and for any day letter, forty-five (45) cents. An overnight message shall be charged for as a night message or as a night letter according to which of these two classifications shall produce the lower charge for the particular message. In no case, however, shall the rate charged for a Government message exceed the amount charged for a commercial message of the same class of service and the same length between the same points.

For the purpose of determining the charges above provided, the charge for the transmission of a commercial message of the same class and length and between the same points should first be ascertained and the Government rate should then be computed at forty (40) per centum of the commercial charge so ascertained.

In cases where the charge for a Government message, thus determinded, shall include a fraction of a cent, such fraction, if less than one-half, is to be disregarded; if one-half or more, it is to be counted as one cent.

In cases where the message in transit to destination passes over the lines of two or more connecting companies subject to this order each such company shall receive for its share of the transmission within the United States the above-designated percentage of its portion of the established through tolls to destination if to a point in the United States, or to the border if the destination is in Canada or Mexico.

In the case of messages from the United States to points in Canada or Mexico, the above-designated percentages shall apply with respect to the transmission within the United States, the basis being the appropriate prevailing commercial rate between the point of origin in the United States and the border.

All Government cable messages take the prevailing commercial cable count through from point of origin to destination. The Western Union and the commercial companies charge one-half the normal cable rate at cable count for the trans-Atlantic transmission of United States Government messages over their cables. The rate

for the inland transmission within the United States of Government cable messages to or from all foreign countries, except Mexico, the normal connection with which is by cable, shall be one-half the inland zone word rate charged on commercial cablegrams between the same points.

* * * * * * *

30 HUBERT WORK,
Postmaster General.

31 EXHIBIT "B-1."

Executive Office, Western Telegraph Company, 145 Broadway, New York.

J. H. Wade, President, H. Sibley, Wm. Orton, N. Green, Vice-Pres'ts, O. H. Palmer, Sec'y & Treas'r.

June 7th, 1867.

SIR,

I have the honor to transmit herewith the acceptance by the Western Union Telegraph Company of the Act of Congress, entitled "An Act to aid in the Construction of Telegraph Lines and to Secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby.

It is intended to be in full compliance with the terms of said Act, and if not in conformity with the rules of your Department I respectfully ask to be advised in what particular it is insufficient that it may be corrected.

I take the liberty of enclosing duplicates of the acceptance and shall feel obliged by your certificate on one of them of the
32 receipt and filing of such acceptance in conformity with the act of Congress and its return to me.

I have the honor to be,
Respectfully, your obt. servt.,

O. H. PALMER, *Secy.*

To Hon. Alex. W. Randall, Postmaster General, Washington, D. C.

33 [Endorsed:] 9. June 8, 1867. Miscellaneous. O. H. Palmer, Esq., Secy. "Western Un. Tel. Co.," New York. Transmits duplicate acceptance by above Co. of provisions of Act of 24 July, 1866. July 12, 1867. Wrote Mr. Palmer that one of said acceptances was filed in this Dept. as required by law; and returned the other so endorsed. (C. C. R.-329). Dec. 16, 1870. Hon. John Hill, M. C., refers letter from D. W. Carpenter, making application for docs. on file in this Dept. on above subject. Dec. 16, 1870. Wrote Hon. J. Hill forwarding certified copies of same. June 5,

1872. Manager of the Western Union Tel. Co., Washington. Sends copy of acceptance of provisions of Act of July 24, 1866, & asks that it may be certified to as correct copy under seal of the Dept. & returned. Also desires certified copy of P. M. G's order establishing rates for gov't. tel. messages, in 1871. June 8, 1872. Wrote Mr. Whitney sending certified copies as desired. Nov. 26, 72. Counsel W. U. Tel. Co., Balt. asks for certified copy of acceptance. Nov'br 27, 72. Sent.

34 Western Union Telegraph Company.

Meeting of the Board of Directors at the Executive Office, 145 Broadway, New York, June 5th, 1867.

Resolved, that this Company does hereby accept the provisions of the Act of Congress entitled "an Act to aid in the construction of Telegraph Lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the Secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the Acting President of the Company, and the seal of the corporation in compliance with the fourth section of said Act of Congress, adopted unanimously.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
[SEAL.]
O. H. PALMER,
Secy. W. U. Tel. Co.

35 [Endorsed:] Filed June 8, 1867. Jos. H. Blackfan, Chief Clerk.

36 EXHIBIT "C."

This agreement and stipulation made this nineteenth day of October, A. D., 1922, by and between the United States Shipping Board Emergency Fleet Corporation and The Western Union Telegraph Company, hereinafter called the Fleet Corporation and the Telegraph Company, respectively,—

Witnesseth, that in consideration of the mutual agreements hereinafter contained said parties agree and stipulate each with the other as follows:

1. That both parties will expedite to a final determination by the Supreme Court of the United States a proposed suit by the Telegraph Company to be brought in the Supreme Court in the District of Columbia against the Fleet Corporation, claiming compensation at the commercial rate for transmitting certain messages from and to the Fleet Corporation billed at Washington during the months of June and July, 1922.

2. That pending the final determination of the matters in controversy in the said suit as aforesaid the Telegraph Company will

render its bills showing thereon the amount charged at the commercial rate, also the amount of charge at the government rate, and the difference between the total of each monthly bill at commercial and government rates, and will attach to the bills so rendered, as vouchers, the originals of messages filed with it, to be charged at the point of origin, and the carbon copies of messages to be charged at the point of destination, as heretofore in the case of bills rendered at the government rate. Said bills are to be immediately rendered covering the months of June and July, 1922, and bills are thereafter to be rendered monthly in like manner.

37 3. Pending the final determination of the above mentioned suit, as aforesaid, the Fleet Corporation will promptly audit the said bills both at the commercial rate and at the government rate, and when so audited and found correct pay the same at the government rate, and promptly deliver to the Telegraph Company a written statement as to each such bill of the amount of the difference between the totals at commericial rates and at government rates, in order that there may be a current account of these differences agreed upon by both parties so as to obviate the necessity of re-rating an accumulation of accounts at the termination of the suit, should the suit be decided in favor of the Telegraph Company.

4. That pending the final determination of said suit as aforesaid the payment of the said bills at the government rate and the receipt thereof by the Telegraph Company shall be without prejudice to its claim, if any, for the balances which would be or are due at the commercial rate. With respect to the accumulated monthly differences aforesaid, except as the law applicable to the case may be changed, the Fleet Corporation and the Telegraph Company will settle their accounts in accordance with the final determination of the suit aforesaid.

5. That pending the final determination of said suit, the Telegraph Company will not because of the non-payment of the difference between the commercial rate and the government rate, suspend the monthly credit of the Fleet Corporation, provided the agreements herein made are currently performed.

6. That nothing in this agreement contained shall affect or conclude the right of the United States Shipping Board Emergency Fleet Corporation to claim that any or all of said messages so

38 transmitted were transmitted to and/or from the Emergency Fleet Corporation, its officers, agents and/or employees while acting solely as the agent and/or instrumentality of the United States Shipping Board, and/or the United States.

In witness whereof the said parties have caused these presents to be signed in their respective corporate names and sealed with their corporate seals the day and year first hereinbefore mentioned.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION.

(Sgd.) By J. B. SMULL,
President.

Attest:

(Sgd.) CLIFFORD W. SMITH.

THE WESTERN UNION TELEGRAPH COMPANY,

(Sgd.) By J. C. WILLEVER,
Vice-President.

Attest:

(Sgd.) A. F. BURLEIGH,
Secretary.

Approved:

(Sgd.) SANFORD H. E. FREUND,
General Counsel.

Approved as to form:

F. R. S.,
General Attorney.

J. J. S. 106-22.

39 EXHIBIT "D."

Certificate of Incorporation.

Know all Men by These Presents, That we, the undersigned, a majority of whom are residents of the District of Columbia desiring to form a corporation under sub-chapter four (4) of the incorporation laws of the District of Columbia, and in pursuance of Section Eleven (11) of an Act of Congress entitled "An Act to Establish a United States Shipping Board," approved September 7, 1916, do hereby certify:

First. That the corporate name of this Company shall be *United States Shipping Board Emergency Fleet Corporation* and the object for which it is formed is — the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States —— and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said sub-chapter four (4) of the incorporation laws of the District — Columbia.

Second. That the existence of this corporation shall be perpetual.

Third. That the capital stock of this corporation shall be Fifty Million dollars ($50,000,000.00), divided into shares of the par value of One Hundred dollars ($100.00) each.

Fourth. That the number of trustees who shall manage the concerns of the company for the first year, or until their successors are elected, a majority thereof being citizens of the
40 District of Columbia, shall be seven (7); namely,

Names.	Residences.
George W. Goethals	43 Exchange Place, New York, N. Y.
William Denman	1020 Merchants Exchange Bldg., San Francisco, Cal
John A. Donald	18 Broadway, New York, N. Y.
William L. Soleau	1361 Harvard St., N. W., Washington, D. C.
Richard H. Bailey, Jr.	1439 Fairmont St., N. W., Washington, D. C.
Timothy C. Abbott	2023 Park Road, N. W., Washington, D. C.
Ellsworth P. Bertholf	1463 Harvard Terrace, Washington, D. C.

The Board of trustees, by the affirmative vote of a majority of the whole board, may appoint from the trustees an executive committee of three (3) members, of which a majority shall constitute a quorum, and to such extent as may be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the board of trustees.

Fifth. That the place in the District of Columbia in which the operations of the company are to be carried on is at Munsey Building in the City of Washington, District of Columbia.

This corporation reserves the right to amend, alter, or change any provision contained in this Certificate of Incorporation, in any manner prescribed by statute, and all rights conferred on stockholders herein granted are subject to this reservaion.

In Witness Whereof we have hereunto affixed our signa-
41 tures and seals, this 16th day of April, A. D. 1917.

WILLIAM DENMAN.	[SEAL.]
JOHN A. DONALD.	[SEAL.]
GEO. W. GOETHALS.	[SEAL.]
T. C. ABBOTT.	[SEAL.]
E. P. BERTHOLF.	[SEAL.]
RICHARD H. BAILEY, JR.	[SEAL.]
WILLIAM L. SOLEAU.	[SEAL.]

I, Edward P. Harrington, a Notary Public in and for the District of Columbia, do hereby certify that William Denman, John A. Donald, Geo. W. Goethals, T. C. Abbott, E. P. Bertholf, Richard H. Bailey, Jr., and Wm. L. Soleau parties to the foregoing and annexed Certificate of Incorporation bearing date of the 16th day of April, 1917, personally appeared before me in this District, this 16th day of April, 1917, and the said William Denman, John A. Donald, Geo. W. Goethals, T. C. Abbott, E. P. Bertholf, Richard H. Bailey, Jr., and William L. Soleau being well known to me as the persons who executed the said Certificate of Incorporation acknowledged the same to be their act and deed.

In witness whereof, I have hereunto set my hand and seal this 16th day of April, 1917.

[NOTARIAL SEAL.] EDWARD P. HARRINGTON,
Notary Public, District of Columbia.

My commission expires January 30, 1922.

42 Office of the Recorder of Deeds, District of Columbia.

This is to certify that the foregoing is a true and verified copy of the Certificate of Incorporation of the "United States Shipping Board Emergency Fleet Corporation," and of the whole of said Certificate of Incorporation, as filed in this Office the 16th day of April, 1917, and recorded in Liber 33, folio 272, et seq., one of the Incorporation Records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this Office this 31st day of May, A. D. 1923.

[SEAL.] ARTHUR G. FROE,
Recorder of Deeds, D. C.

43 EXHIBIT "D-1".

This is to certify that at a meeting of the stockholders of the United States Shipping Board Emergency Fleet Corporation, held at its office in Washington, D. C., on August 3rd, 1917, at which meeting all but four shares of the capital stock was represented, and the notice required by Statute having been waived by all stockholders, Mr. Edward N. Hurley was elected Chairman and Mr. Lester Sisler Secretary. On motion duly made it was unanimously resolved:

"That the certificate of incorporation of this corporation be amended in the manner provided in the laws of the District of Columbia by substituting for the last paragraph of the fourth section thereof, the following:

'The Board of Trustees, by the affirmative vote of a majority of the whole Board, may appoint from the Trustees an Executive Committee of three (3) members and a Transportation Committee of three (3) members, of which a majority shall constitute a quorum and to such extent as may be provided in the by-laws, said Committee shall have and may exercise all or any of the powers of the Board of Trustees.'"

EDWARD N. HURLEY,
President.

LESTER SISLER,
Secretary.

I, Edward N. Hurley, being duly sworn say that the above is a true and correct transcript of the minutes of the meeting.

EDWARD N. HURLEY.

Subscribed and sworn to before me this third day of August, 1917.
[NOTARIAL SEAL.] W. L. SOLEAU,
Notary Public.

44 I, W. L. Soleau, a Notary Public in and for the District of Columbia, do certify that Edward N. Hurley, President of the United States Shipping Board Emergency Fleet Corporation, party to the foregoing and annexed certificate, dated August 3rd, 1917, being personally and well known to me, as the person who executed the above certificate, personally appeared before me this 7th day of August, 1917 and acknowledged same to be his act and deed.

[NOTARIAL SEAL.] W. L. SOLEAU,
Notary Public.

45 Office of the Recorder of Deeds, District of Columbia.

This is to certify that the foregoing is a true and vertified copy of the Certificate of Amendment of the Certificate of Incorporation of the "United States Shipping Board Emergency Fleet Corporation," and the whole of said Certificate of Amendment as filed in this Office the 8th day of Aug., A. D. 1917, and recorded in Liber 33, folio 371, et seq., one of the Incorporation Records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this Office this 31st day of May, A. D. 1923.

[SEAL.] ARTHUR G. FROE,
Recorder of Deeds, D. C.

46 *Certificate to Officers.*

Supreme Court of the District of Columbia.

DISTRICT OF COLUMBIA, *To wit:*

I, Walter I. McCoy, Chief Justice of the Supreme Court of the District of Columbia, do hereby certify that Arthur G. Froe, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Recorder of Deeds, District of Columbia and that said attestation by him is in due form, and that he is the proper officer to make the same.

Witness my hand and seal this 1st day of June, 1923.

[SEAL.] WALTER I. McCOY,
Chief Justice.

DISTRICT OF COLUMBIA, *To wit:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify that Walter I. McCoy, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 1st day of June, 1923.

[SEAL.] MORGAN H. BEACH,
Clerk.
By CHAS. B. COFLIN,
Assistant Clerk.

47 EXHIBIT "D-2" AND "D-3."

Extract from Proceedings of the United States Shipping Board.

April 14, 1917.

Upon motion duly made, seconded and carried, the following Resolution was adopted:

Whereas, In the judgment of the Board it is necessary to carry out the purpose of the Act to Establish a United States Shipping Board, approved September 7, 1916, that a corporation be formed under the laws of the District of Columbia, for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, be it therefore

Resolved, In pursuance of authority conferred on the Board by Section 11 of the said Act, that a corporation for the above purpose be formed, to be known as the United States Shipping Board Emergency Fleet Corporation, with a capital stock of Fifty Million Dollars ($50,000,000), and be it further

Resolved, That the Chairman be authorized to procure the necessary papers to be drawn up, and acts to be done, in accordance with the laws of the District of Columbia, for the formation of the said corporation.

Upon motion duly made, seconded and carried, the following Resolution was adopted:

Whereas, It is proposed to organize a corporation under the laws of the District of Columbia, to be known as the United States Shipping Board Emergency Fleet Corporation, with a capital stock of $50,000,000.00 of the par value of $100 a share,

Resolved, That the Board do subscribe to 499,993 shares of stock of the said corporation, for and on behalf of the United States, and be it further

Resolved, That the Chairman be authorized to sign on behalf of the Board the necessary subscription papers.

48 EXHIBIT "E-1."

United States Shipping Board,
Washington.

Resolution Adopted by the United States Shipping Board Sept. 30, 1921.

Whereas, The Merchant Marine Act, 1920, provides that the power and authority thereby vested in the United States Shipping

Board may be exercised either directly by the Board, or by it through the United States Shipping Board Emergency Fleet Corporation, except as therein otherwise specifically provided, and

Whereas, In the opinion of the Shipping Board, the executive and personnel organization of the Emergency Fleet Corporation has been completed to such a standard of efficiency as to make it desirable that the United States Shipping Board should exercise through the United States Shipping Board Emergency Fleet Corporation various administrative powers and functions, thus making it possible for the United States Shipping Board to devote its attention to study and determination of the broad and constructive questions of policy relating to the maintenance, development and encouragement of the American Merchant Marine, under the powers and duties imposed upon the United States Shipping Board by law,

Therefore, be it resolved, That it is the sense of the United States Shipping Board that its Chairman should retire as President, and that its members should retire as Trustees of the said United States Shipping Board Emergency Fleet Corporation, and that there should forthwith be elected a separate President and a separate Board of Trustees for the said United States Shipping Board Emergency Fleet Corporation; and

Be it further resolved, That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall, until otherwise ordered by the Board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

(1) The operation, maintenance, repair and reconditioning of vessels provided that no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.

(2) The completion or conclusion of any construction work upon vessels which has theretofore been begun or has been authorized by the United States Shipping Board.

(3) The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe.

(4) The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

(5) The operation and sale of dry docks; all sales to be
49 subject to such terms and prices as may be established by the United States Shipping Board.

(6) The custody and sale of all other property and materials.

(7) All accounting for the United States Shipping Board Emergency Fleet Corporation.

(8) Insurance and matters pertaining to the same.

(9) The operation of all piers and pier facilities: provided that

no pier or pier facilities shall be leased without prior authorization from the United States Shipping Board.

(10) The leasing and rental of offices, warehouses, docks and storage facilities.

(11) All matters incidental to any of the foregoing, including the execution of contracts, charters, bills of sale, leases, deeds and other instruments necessary or convenient to the exercise of the power and authority hereby conferred upon the United States Shipping Board Emergency Fleet Corporation; and

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the United States Shipping Board Emergency Fleet Corporation and a summary thereof transmitted to the Chairman and each Commissioner of the United States Shipping Board, and that notices of meetings of the Board of Trustees of said Emergency Fleet Corporation be duly sent to each member of the United States Shipping Board; and

Be it further resolved, That the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, and that the President and each of the Trustees of the United States Shipping Board Emergency Fleet Corporation be and hereby are required to deposit with the Secretary of the United States Shipping Board their several resignations, for acceptance at the pleasure of the United States Shipping Board, and to deliver to the Secretary of the United States Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer.

I hereby certify this — day of ——, 192-, that the foregoing is a true and correct copy of a resolution adopted by the United States Shipping Board at a meeting held September 30, 1921, as shown by the official Minutes of the United States Shipping Board in the custody of the Secretary.

—— ——,
Secretary.

50 EXHIBIT "E-2."

United States Shipping Board,
Washington.

Resolution Adopted by the United States Shipping Board Jan. 10, 1924.

The resolution of the United States Shipping Board passed September 30th, 1921 is hereby amended to read as follows:

Whereas, The Merchant Marine Act, 1920, provides that the power and authority thereby vested in the United States Shipping Board may be exercised either directly by the Board, or by it through the United States Shipping Board Emergency Fleet Corporation, except as therein otherwise specifically provided; and

Whereas, In the opinion of the Shipping Board, the executive and
onnel organization of the Emergency Fleet Corporation is
pped to efficiently exercise through the United States Shipping
rd Emergency Fleet Corporation various administrative powers
functions, thus making it possible for the United States Ship-
Board to devote its attention to study and determination of the
d and constructive questions of policy relating to the mainten-
, development and encouragement of the American Merchant
ine, under the powers and duties imposed upon the United States
ping Board by law.

herefore, be it resolved, That it is the sense of the United States
ping Board that neither its Chairman nor any member of the
rd should hold any office of the Emergency Fleet Corporation,
that no member of any department of the Shipping Board
ld hold any office of the Emergency Fleet Corporation unless
Shipping Board and the Board of Trustees of the Emergency
t Corporation concur.

e it further resolved, That the power and authority vested in the
ping Board by the Merchant Marine Act, 1920, shall be exer-
d by it through the Emergency Fleet Corporation in the follow-
matters, and to the extent and in the manner hereinafter pro-
d:

The selection, employment or removal of all officers and em-
ees of the Emergency Fleet Corporation and their compensation
be under the control of the Board of Trustees and — or officers
at corporation in the manner provided for in the By-Laws of
corporation, provided, however, that the salaries and other
pensation of the officers and of the Trustees shall be subject to the
oval of the Board; and provided further: the employment of
sel and all litigation shall remain under the control of the
ping Board, which shall assign to the Emergency Fleet Cor-
tion such attorneys as may be needed by the President of the
rgency Fleet Corporation for the proper conduct of its busi-
ness.

2. The management, operation, maintenance and repair of vessels; including ordinary re-conditioning of vessels.

The establishment and operation of lines and routes which the
ping Board, under the powers conferred upon it by Section 7 of
Merchant Marine Act, 1920, has heretofore authorized and di-
d or may hereafter authorize and direct; no established line
be discontinued, or new line established, or allocation of pas-
er vessels made, without the approval of the United States Ship-
Board.

The completion or conclusion of any construction work upon
ls which has heretofore been begun or has been authorized by
nited States Shipping Board.

The sale of vessels (except to aliens) at such prices and on such
s and conditions as the United States Shipping Board may pre-
e or approve.

6. The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

7. The operation and sale of dry docks; all sales at such prices and on such terms and conditions as the United States Shipping Board may prescribe or approve.

8. The custody and sale of all other property and materials.

9. All accounting for the Emergency Fleet Corporation.

10. The insurance of vessels and other property in its custody; and matters pertaining to insurance; subject, however, to the control and supervision of the Board, with respect to the placing of insurance.

11. The operation of piers and pier facilities owned or leased by the Shipping Board and at present used by its vessels; and the operation of such other piers and pier facilities as may be transferred to it by the Shipping Board.

12. The disbursement and expenditure of all moneys arising out of operations; and such other funds as may be allotted to it from appropriations heretofore made to the Shipping Board; or which may hereafter be made the Shipping Board; and also moneys arising from appropriations hereafter made by Congress for the exclusive use of the Emergency Fleet Corporation.

13. The leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and for its terminal facilities; but no lease for a period exceeding one year shall be made without the consent of the Shipping Board.

52 14. The settlement, including payments or collections, of all matters arising out of the above-mentioned powers before or after the date of this resolution.

15. All matters incidental to any of the foregoing powers, including the execution of contracts, charters, bills of sale, leases and other instruments necessary or convenient to the exercise of such powers are hereby conferred upon the Emergency Fleet Corporation.

Be it further resolved, That an accurate record shall be made of the proceedings of every meeting of the Trustees of the Emergency Fleet Corporation and a summary thereof transmitted to the Chairman and each Commissioner of the Shipping Board.

Be it further resolved, That the voting power upon the stock and the control of the United States Shipping Board Emergency Fleet Corporation shall remain with the United States Shipping Board, according to law; and the President and each of the Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several qualifying shares of stock in the United States Shipping Board Emergency Fleet Corporation, duly endorsed in blank for transfer; and the officers of the Emergency Fleet Corporation shall deliver to the President of the Emergency Fleet Corporation their several resignations for acceptance at his pleasure; and the President and Trustees of the Emergency Fleet Corporation shall deliver to the Secretary of the Shipping Board their several resignations for acceptance at the pleasure of the Shipping Board.

Be it further resolved, That in passing this resolution the United States Shipping Board declares that it is its policy to delegate to the Emergency Fleet Corporation, all power, authority and control essential to the full and efficient operation by it of all lines at present operated or which may be hereafter authorized. All vessels now being operated are hereby allocated to the Emergency Fleet Corporation; and, other vessels of the Board will be allocated to it when reasonably required for the equipment of present lines or lines hereafter authorized. All vessels of the Shipping Board not in use, are also placed in the custody and care of the Emergency Fleet Corporation.

Be it further resolved, That nothing herein contained shall be construed as a transfer of title or ownership of vessels, docks, or other property, real or personal, belonging to the United States; the possession and control by the Emergency Fleet Corporation of any vessels or other property delivered to it under this resolution shall be solely that of an agent, with limited powers. All contracts, and agreements made by the United States Shipping board Emergency Fleet Corporation shall clearly show that the same are contracts and agreements of the United States Shipping Board acting through the United States Shipping Board Emergency Fleet Corporation as its authorized agent.

53 Be it further resolved, The right and duty of the Shipping Board to exercise any and all powers of supervision and control vested in or imposed upon it by law remain in full force and effect.

Be it further resolved, That all resolutions, general or special orders or office memoranda of the United States Shipping Board heretofore passed, inconsistent with the resolution of September 30, 1921, as amended hereby, are repealed, in so far as they conflict with the provisions of this resolution.

54 EXHIBIT "F."

United States Shipping Board,

Washington

October 12, 1917.

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon.

1. The ships affected by said requisition and included therein are (*a*) All cargo ships able to carry not less than 2,500 tons total deadweight, including bunkers, water, and stores.

(*b*) All passenger steamers of not less than 2,500 tons gross register.

2. (*a*) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inward cargo and ship is put in ordinary good condition.

(*b*) As to steamers which have started to load their outward cargo, requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports, that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as prompty as possible and report for requisitioning.

4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (*a*) Owners, whose steamers are operating in their regular trades, are to continue the operation of their steamers for account of the Government, as they have been doing for themselves, until they receive further instructions.

(*b*) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers.

(Signed) BAINBRIDGE COLBY,
Commissioner.

55 EXHIBIT "G."

By virtue of an Act of Congress, approved June 15, 1917, entitled "An Act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes" and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive Order of the President, dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons D. W. capacity, under construction in your yard and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said Act and said Order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration and their character and extent, and will not

enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this Corporation.

(Signed) W. L. CAPPS.
General Manager, United States Shipping Board Emergency Fleet Corporation.

Washington, D. C., August 3, 1917.

56 EXHIBIT "H."

United States Shipping Board Emergency Fleet Corporation.

Certificate of Payment of Capital Stock.

We, the undersigned, the President and a majority of the Trustees of the United States Shipping Board Emergency Fleet Corporation, a corporation, organized and existing under the laws of the District of Columbia, do hereby certify that the whole amount of the capital stock fixed and limited by the said Company, to wit: Fifty Million Dollars ($50,000,000), has been fully paid in.

In witness whereof we have hereto set our hands and seals this first day of May, 1918.

[SEAL.] [L. S.]	(Sgd.)	EDWARD N. HURLEY, *President;*
[SEAL.] [L. S.]	(Sgd.)	BAINBRIDGE COLBY,
[SEAL.] [L. S.]	(Sgd.)	JOHN A. DONALD,
[SEAL.] [L. S.]	(Sgd.)	CHAS. R. PAGE,

A Majority of the Trustees.

DISTRICT OF COLUMBIA, *ss:*

Before me, a Notary Public, within and for the said District, personally appeared the said Edward N. Hurley, Bainbridge Colby, John A. Donald, and Charles R. Page, to me personally known and known by me to be the President and a majority of the Trustees of the United States Shipping Board Emergency Fleet Corporation, and severally made oath that the statements contained in the foregoing instrument are true.

Given under my hand and seal this first day of May, 1918.

[Lester Sisler, Notarial Seal.]

(Sgd.) LESTER SISLER,
Notary Public.

O. K.
(Sgd.) J. F. C.

57 Copy.

EXHIBIT "I" 1 TO 19, INC.

Vice-President Farley.

Washington, D. C., June 9, 1922.

E. M. Bull, A. H. Bull and Company,
40 West Street,
New York City:

Our calculations show that the deadweight on the Nethnor Mason City and Macomet total fifteen thousand three hundred ninety-four tons stop I am willing to recommend to the Board the deadweight of these vessels be ascertained by any one of the following surveyors—Stevenson Taylor Frank Martin, D. H. Cox or Robert Haight—and that his findings be final and binding on both parties provided you will agree to pay thirty dollars per ton on the total deadweight as determined by said surveyor less the seven thousand dollars insurance damage to the Mason City and Macomet Stop You to pay all necessary expense in connection with determining the deadweight on the above three vessels and the Maddequet when available Stop Condition resighting bottom to be as agreed upon, namely expense to be for your account unless damages are found which we elect not to repair or allow for.

EDWARD P. FARLEY,
Vice President, in Charge of Sales.

58 Copy.

P. Sinclair, Asst. to Financial Vice-Prest.

Washington, D. C., June 10, 1922.

W. A. Fletcher Company,
Hoboken, New Jersey:

Records show your concern indebted to Emergency Fleet Corporation amount nine thousand seven hundred twenty seven dollars seven cents stop Statement follows.

P. SINCLAIR.

RGD-McJ.

Comptroller's Department.

59 Copy.

W. F. Okeefe, Head Sales Section.

Washington, D. C., 11, June 10, 1922.

J. R. White,
Bethlehem Shipbuilding Corporation,
Bethlehem, Pa.:

Your offer sixth send your certified check for nineteen thousand one hundred thirty three dollars and ninety two cents stop Sales agreement now being drawn up here for your signature.

W. F. OKEEFE,
Emergency Fleet.

W. F. OKEEFE: EL.

Material Sales Division.

Surplus Property Department.

60 Copy

(Designation:) Traffic Manager

Washington, D. C., 10:00 a. m., June 10, 1922.

Tampa Interocean S.S. Company,
11 Broadway,
New York City, New York:

WEST IRA very difficult pass on this matter on basis meager information you submit stop

Have no details regarding freight contracts but assuming same are the usual form we cannot be held for breakdown in machinery as this is something beyond our control stop on above basis or at lease pending further advices must decline allowance in freight requested 92

KEENE,
Traffic Manager.

WNKh.

File Note: Before sending this telegram I got Mr. Snider's verbal views and he stated he believed we should decline the allowance on the information on hand.

61 Copy.

g-V.

Head Vessel Delivery Section.

Washington, D. C., at 9:05 a. m., June 10, 1922.
Govt. fast day.

Lone Star Steamship Company,
Galveston, Texas:

Advise expected date and port redelivery Lake Fairlie Four twenty eight.

GENDRON.

PAS:s.
E. F. C., Contract Division.

62 Copy.

J. L. Kennedy, District Comptroller, Portland.

Washington, D. C., 11:00 a. m., June 12, 1922.

Baird,
Emergency Fleet Corporation,
Portland, Oregon:

Review by construction Division standifer inventories indicates we have listed an excess of possible requirements of asbestos millboard flats and rounds, rope, pipe, and miscellaneous electric equipment stop We propose crediting standifer account with say twenty five perecnt of original cost of such excess instead of invoice cost stop Based on sales experience in your opinion is such an allowance equitable to both Fleet and contractor

KENNEDY.

Construction, General Comptroller's Department, 9.11-S.

63 Copy.

Advertising Manager.

Washington, D. C., June 12, 1922.

F. M. Wolf,
Munson Steamship Line,
67 Wall Street,
New York City:

Do you maintain record by names and addresses of inquiries made direct to your line from advertising stop If so please check your passengers lists since January first against such record to determine number of passengers resulting from such direct inquiries stop Report should show key number of advertisement if given in inquiry stop Please advise when this report will be received as in-

formation requested is necessary in determining next fiscal year advertising appropriation Hundred forty five.

JAMES W. BORING,
Advertising Manager.

JWB.
Operations, Advertising.

64 Copy.

Traffic Manager.

Washington, D. C., 10:00, June 12, 1922.

S. W. McLaren,
Morris and Company,
Chicago, Ill.:

Refer your wire claim Labette conference with Bolton and Blake stop Agreeable settling claim for three thousand dollars stop Instructing payment today seven forty five.

KEENE,
Emergency Fleet.

JFG/EH.
Emergency Fleet Corporation, Traffic.

65 Copy.

Traffic.

Washington, D. C., 3:30, June 12, 1922.

Coste,
National Coffee Roasters Association,
74 Wall street,
New York City:

Supplementing my four eighty three George Pierce unavoidably delayed Plate will arrive Santos about nineteenth load coffee four eighty eight.

KEENE,
Shipboard.

NGT. H.
Operations, traffic.

66 Copy.

H. P. Gardner, Mgr., Mortgage Sales.

Washington, D. C., 10:00 a. m., June 24, 1922.

Victor J. Humbrecht,
Stephen-Girard Building,
Philadelphia, Pa.:

Expect to close bids on Harriman Mortgages Monday morning stop To avoid further negotiations give me final and highest bid by nine Monday morning next.

GARDNER.

Mortgages sales—Finance.

67 Copy.

Washington, D. C., June 24, 1922.

C. S. Nye,
U. S. Shipping Board, E. F. C.,
Montreal, Canada:

Re suit just commenced Quebec District Montreal Superior Court stop Retain LaFleur MacDougall MacFarlane & Barclay to represent Fleet Corporation stop Further instructions by letter follow.

CHAUNCEY G. PARKER,
Chief Counsel, Emergency Fleet Corporation.

CHP:cb.
Construction, law.

68 Copy.

J. Harry Philbin, Mgr. Dept. of Ship Sales

Washington, D. C., 11.45 a. m., June 24th, 1922.

Garland Steamship Corporation,
511 Fifth Avenue, New York, N. Y.:

Retel. date. Understand you wish to dock only Eastern Imported stop Please deposit balance purchase price with Benn Barber together with evidence that appropriate insurance has been arranged stop Will then have Importer docked by Board expenses thus incurred to be paid by you stop Bills sale will be forwarded early next week.

PHILBIN,
Ship Sales.

JHP:M:M.
Construction, Ship Sales.

69 Copy.

Traffic.

Washington, D. C., 12 a. m., June 24, 1922.

Felix Coaste,
National Coffee Roasters Association,
74 Wall St.,
New York City:

Vessels loading next week Southern Cross due Santos June twenty seventy sails June twenty eighth arrives Rio sails June twenty ninth New York stop George Pierce Santos sails July first arrives Victoria July third sails fifth New Orleans four thirty-two.

KEENE.

JGT-C.
Operations, traffic.

70 Copy.

J. Harry Philbin, Mgr. Dept. of Ship Sales.

Washington, D. C., 12:30 p. m., June 30, 1922.

Pacific States Lumber Company,
San Francisco, Cal.:

Contract for purchase of S. S. Cottonwood from us calls for a cash payment of $50,000. This contract was executed March 24 1922 stop We requested Hough take steps for completion of same May 18, 1922, May 23, 1922 stop Advised by office of Edward S. Hough May 22 that there was no one at your place of business having authority to make decision and Hough in Europe stop As you may be interested we hereby notify you that payment not having been made in accordance with the terms of this contract by purchaser We regard same broken and shall proceed at once to protect our interests.

PHILBIN,
Ship Sales.

JHP:M:M.
Construction, Ship Sales.

71 Copy.

June 16, 1922.

From: Traffic Department.
To: Cable Section.

Kindly transmit the following cable to Manila:

"Understand new regulations Manila require a consignee present two negotiable and one non-negotiable copy bills of lading in order obtain delivery of cargo stop Funch Edye have taken initiative in notifying shippers these requirements stop We should be kept posted such important matters."

W. B. KEENE,
Traffic Manager.
By V. J. FREEZE,
Head Far East and Long Voyage Trades Division.

VJF/k.

72 Copy.

June 17, 1922.

From: W. B. Keene, Traffic Manager,
To: Telegraph and Cable Section.

Please transmit the following message to Mr. Love care London office (regular cable):

Standard Oil inquiring rate three hundred thousand cases Oil movement nineteen twenty three to Benang Port Swettenham Singa-

port stop Indications twenty-three cents stop Will not quote this far in advance this trade unless you think advisable.

W. B. KEENE,
Traffic Manager.

WHKb.

73 Copy.

June 24, 1922.

From: M. W. Bowen, Manager Fuel Department,
To: Cable Department, via Mr. Cowen.

Please transmit the following cable to Amshibo London:

My thirteen seventy four your thirteen naught eight continue until at least end Gueret Gait contract August thirty-first and longer if you consider price satisfactory to supply best available coal to Washington and America stop Advise us what you do.

M. W. BOWEN,
Manager Fuel Department.

74 Copy.

June 24, 1922.

From: M. W. Bowen, Manager Fuel Dept.,
To: Cable Dept. via Mr. Cowen.

Please transmit the following cable to Amshibo, London:

Your fourteen ninetyfour you authorized close with Lambert Brothers our requirements only Ceuta until December thirty-first nineteen twenty-two at price not exceeding sixty-seven and six per ton for installation provided they agree to fall clause which we think they should do in view of similar action by British Mexican stop Advise what to do.

W. M. BOWEN,
Manager Fuel Department.

MWB:MM.

75 Copy.

June 26, 1922.

From: W. B. Keene.
To: Telegraph and Cable Section.

Please transmit the following message to Mr. Love, care London Office (straight cable):

Fourteen seventy six.
Moloney refers competition Royal Mail Steam Packet Europe stop He believes rate suggested will encourage travel States connection stop over Rio Exposition stop Will also be necessary for us reduce rates between Argentine and Rio Santos to meet competition Royal Mail and new German steamers.

W. B. KEENE,
Traffic Manager.

WBKb.

76 *Plea.*

Filed January 23, 1925.

* * * * * * *

Now comes the defendant, the United States Shipping Board Emergency Fleet Corporation, and for its plea to the declaration says:

1. The defendant, the United States Shipping Board Emergency Fleet Corporation, admits and avers that the plaintiff is a Corporation duly organized and existing under the laws of the State of New York, and that the said defendant is a Corporation of the District of Columbia.

The defendant admits and avers that at the times set forth in the declaration, and for a long time prior thereto, the plaintiff was engaged in the business of transmitting messages by telegraph in, to and from the District of Columbia, the several States of the United States and elsewhere, and that the plaintiff charged for transmitting messages by telegraph, fixed sums of money or tariffs established and made the legal and uniform rates in conformity with the Act of Congress known as the Interstate Commerce Act and amendments thereto, and that the usual and legal rates applicable to such messages were dependent upon the points of origin and destination of such messages, the number of words therein contained and the class of service.

The defendant avers that the charges, fixed sums, tariffs and legal and uniform rates admitted and averred in the paragraph immediately preceding this paragraph have reference both by the plaintiff and the defendant herein to only the legal commercial rates of the plaintiff.

The defendant admits and avers that it requested the plaintiff to perform services in transmitting and delivering messages, but
77 only as hereinbefore averred, and agreed to pay to the plaintiff the legal charges therefor at the end of each and every calendar month in respect to message-service performed during the month, and that upon said request and agreement the plaintiff performed such services for the defendant; and that such services extended through the months of June, 1922, and July, 1922.

The defendant avers that the established legal rates referred to in the immediately foregoing paragraph were not the legal commercial rates of the plaintiff but were forty (40) per centum therefor, namely, the legal Government rates applicable to the defendant as hereinafter averred.

The defendant admits and avers that the plaintiff has demanded of it, the defendant, One Thousand Nine Hundred Thirty-one Dollars and Four Cents ($1,931.04) for telegraphic service rendered by the plaintiff to the defendant during the month of June, 1922, and the further sum of Five Hundred and Five Dollars and Ninety-five Cents ($505.95) for telegraphic service rendered by the plaintiff to the defendant during the month of July, 1922.

The defendant avers that the two sums named in the immediately foregoing paragraph represent the legal commercial rates of the plaintiff (that is, two and one-half ($2\frac{1}{2}$) times the legal Government rates in the premises) and further avers that such legal commercial rates at no time applied or could be legally applied to messages transmitted or delivered at the instance of the defendant.

The defendant avers that it tendered to the plaintiff, on rendition of bills by the defendant to the plaintiff, the sum of Seven Hundred and Seventy-two Dollars and Forty-two Cents ($772.42) for
78 the said telegraphic service rendered by the plaintiff to the defendant during the month of June, 1922, and the sum of Two Hundred and Two Dollars and Thirty-eight cents ($202.38) for the said telegraphic service rendered during the month of July, 1922, but that said tenders were by the plaintiff refused, although the said tenders were forty (40) per centum of the legal commercial rate, the said per centum being the legal Government rate.

The defendant avers that the statement in the declaration that the messages therein referred to were transmitted and delivered by the Telegraph Company for and at the request of the Fleet Corporation is true in fact, and the computation of the amount of charge which is or would be due therefor at the commercial rate is correct, except that the enumeration of messages set forth in the particulars of demand annexed to the declaration herein and the charges in respect to said messages are subject to these corrections, that certain items therein should be charged against others than the Fleet Corporation, and certain other items are duplicate charges, and therefore there should be eliminated from the June, 1922, domestic bill, charges totaling the sum of $4.67, and from the July, 1922, domestic bill, charges totaling $3.02.

The defendant avers that the charges at the Government rate upon the messages set forth in the said particulars of demand, after making the eliminations last referred to, are as follows: for the month of June, 1922, domestic, $636.15; June, 1922, cable $180.87; July, 1922, domestic, $204.69.

The defendant avers that since the filing of the declaration
79 herein, and on or about January 25, 1923, the Fleet Corporation has paid to the Telegraph Company the charges aforesaid at the Government rate, without prejudice to the contentions of either party hereto.

The defendant avers that its said tenders as set forth in the immediately preceding paragraph to the plaintiff were based upon and in conformity with the legal Government rates as established by the Postmaster General of the United States on July 1st, 1921, and July 1st, 1922, by authority in him vested by an Act of Congress approved July 24, 1866 entitled "An Act to aid in the construction of telegraphic lines and to secure to the Government the use of the same for postal, military and other purposes," which Government rates are, and at the times herein pertinent were, by the Act applicable to telegraphic communications sent or received by this defendant in the matters set forth in the declaration.

That Section 4 of the aforesaid Act of Congress reads as follows:

"That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this Act,"

and in compliance with the terms of this section, the Board of Directors of the plaintiff company on June 5, 1867 duly adopted a resolution accepting the provisions of the Act with all the powers, privileges, restrictions and obligations conferred and required thereby, and on June 8, 1867, pursuant to the resolution, filed with the Postmaster General its written acceptance of the provisions of the Act and of the restrictions and obligations imposed and required thereby.

86 The defendant avers that all its funds and moneys are, and at all times herein pertinent were, appropriated to it by the Congress of the United States from the Treasury of the United States and that all funds and moneys by the defendant at any time received are, and at all times have been appropriated by law to be disbursed and used by this defendant as the corporate agency and instrumentality of the United States for the sole purpose of the United States, and in their interest, and that the defendant at no time has had any assets whatsoever other than those derived from the appropriations aforesaid.

The defendant avers that the United States Shipping Board was established by an Act of Congress, approved September 7, 1916, entitled,

"An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign coutries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

By the terms of Section 11 of the said Act there was vested in the said Shipping Board the power, if in its judgment such action was necessary to carry out the purposes of the Act, to form under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States. The said Section further provided that the total capital stock of any corporation or corporations formed pursuant to the power conferred thereby should not exceed $50,000,000.00, and the said Shipping Board was authorized thereby, for and on behalf of the United
81 States, to subscribe to, purchase and vote not less than a majority of the capital stock of any such corporation, and to do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of the said Act.

Acting pursuant to the authority conferred upon it by the said Section of the aforesaid Act, the said Shipping Board, concluding that the formation of a corporation was necessary to carry out the purposes of the Act, caused this defendant to be incorporated on the 16th day of April, 1917, under the laws of the District of Columbia with an authorized capital stock of $50,000,000.00, and, in behalf of the United States, subscribed to and purchased all of said capital stock, which was paid for by the United States, and ever since the formation of said corporation the said Shipping Board, through its designated representatives, has voted the said stock at all meetings of the stockholders thereof. That thereafter by resolutions duly adopted by the said Shipping Board, pursuant to authority vested in it by the said Act of Congress and the amendments thereto, and by the Merchant Marine Act, approved June 5, 1920, the said Shipping Board duly constituted the defendant its instrumentality and the instrumentality of the United States with full power to act for the United States in all and singular the matters referred to in and covered by the telegraphic messages averred in the declaration herein and set out in the particulars of demand annexed thereto.

The defendant avers that it is and at all times herein pertinent has been, by law and by executive orders of the President of the United States, and by the aforesaid resolutions of the Shipping Board, acting solely as the agent and instrumentality of the United
82 States Shipping Board and of the United States and in no other capacity whatever, and that all the aforesaid telegraphic messages were transmitted and received in pursuit of such authority and exclusively in the course of its employment as such agent and instrumentality, of all of which the plaintiff at all times had full knowledge and notice.

The defendant avers that the plaintiff, the Western Union Telegraph Company, did accept from and transmit at the instance of the defendant and its officers and agents throughout the period pertinent to this cause and long anterior thereto, that is, continuously from the time of its creation, telegrams on a form captioned "Official Telegram—Government Rate," which caption bore the name of the plaintiff, to wit, "Western Union," and the name of the defendant, to wit, "United States Shipping Board Emergency Fleet Corporation," in contradistinction to the commercial-rate form, which bore the caption "Western Union Telegram," the plaintiff accepting the said forms and transmitting said telegrams at Government rates for several years, to wit, continuously and without objection or protest until the present issue arose in June, 1922.

The defendant avers that the United States Shipping Board since its creation has been and still is an independent department of the Government of the United States, and that the plaintiff has for many years and without objection afforded the said Board, as well as each and every other independent department of the Government, the Government rates hereinbefore averred for the transmission of messages.

The defendant avers that all its acts including the transmission of the telegraphic messages referred to in the declaration and

83 set out in the particulars of demand annexed thereto were done and performed by it solely as the corporate agency and instrumentality of the Government and in the exercise by it of the sovereign powers of the Government, duly delegated to it as aforesaid.

2. The defendant, for a further plea, reaffirms and incorporates by reference as fully as if here repeated, all its admissions and averments contained in its foregoing first plea so far as they may be applicable to the averments contained in the second count of the plaintiff's declaration in this case.

The defendant avers that it tendered to the plaintiff, on rendition of bills by the defendant to the plaintiff, the sum of Nine Hundred Seventy-four Dollars and Eighty Cents ($974.80) (being $772.42 plus $202.38) in full discharge of the claims averred in paragraph 2 of the declaration, that is, in the second count thereof, but that said tenders were refused by the plaintiff.

The defendant avers that the statement in the declaration that the messages therein referred to were transmitted and delivered by the Telegraph Company for and at the request of the Fleet Corporation is true in fact, and the computation of the amount of charge which is or would be due therefor at the commercial rate is correct, except that the enumeration of messages set forth in the particulars of demand annexed to the declaration herein and the charges in respect to said messages are subject to these corrections, that certain items therein should be charged against others than the Fleet Corporation, and certain other items are duplicate charges, and therefore there should be eliminated from the June, 1922, domestic bill, charges totaling the sum of $4.67, and from the July, 1922, domestic
84 bill, charges totaling $3.02.

The defendant avers that the charges at the Government rate upon the messages set forth in the said particulars of demand, after making the eliminations last referred to, are as follows: for the month of June, 1922, domestic, $636.15; June, 1922, cable $180.87; July, 1922, domestic $204.69.

The defendant avers that since the filing of the declaration herein, and on or about January 25, 1923, the Fleet Corporation has paid to the Telegraph Company the charges aforesaid at the Government rate, without prejudice to the contentions of either party hereto.

The defendant avers that the sums so tendered to but refused by the plaintiff were the equivalent of the legal Government rates for the claims in the said second count, whereas the amounts therein set forth by the plaintiff represent the legal commercial rates for the said claims, (that is, two and one-half ($2\frac{1}{2}$) times the legal Government rate), and further avers that such legal commercial rates at no time applied to messages transmitted or delivered at the instance of the defendant.

The defendant avers that its said tenders to the plaintiff were based upon and in conformity with the legal Government rates established by the Postmaster General of the United States on July 1st, 1921, and July 1st, 1922, by authority in him vested by the aforesaid Act

of Congress approved July 24th, 1866, which legal Government rates are, and at the times herein pertinent were, by virtue of that Act, applicable to telegraphic communications sent or received by this defendant in the premises.

85 That Section 4 of the aforesaid Act of Congress reads as follows:

"That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this Act."

In compliance with the terms of this section, the Board of Directors of the plaintiff company on June 5, 1867, adopted a resolution accepting the provisions of the Act with all the powers, privileges, restrictions and obligations conferred and required thereby, and on June 8th, 1867, pursuant to the resolution, filed with the Postmaster General its written acceptance of the provisions of the Act and of the restrictions and obligations imposed and required thereby.

The defendant avers that all its funds and moneys are, and at all times herein pertinent were appropriated to it by the Congress of the United States from the Treasury of the United States, and that all funds and moneys by the defendant at any time received are, and at all times have been appropriated by law to be disbursed and used by this defendant as the corporate agency and instrumentality of the United States for the sole purposes of the United States, and in their interest and that the defendant at no time has had any assets whatsoever other than those derived from the appropriations aforesaid.

The defendant avers that the United States Shipping Board was established by an Act of Congress, approved September 7, 1916, entitled,

"An Act to establish a United States Shipping Board for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the re-

86 quirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

By the terms of Section 11 of the said Act there was vested in the said Shipping Board the power, if in its judgment such action was necessary to carry out the purposes of the Act, to form under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States. The said Section further provided that the total capital stock of any corporation or corporations formed pursuant to the power conferred thereby should not exceed $50,000,000.00, and the said Shipping Board was authorized thereby, for and on behalf of the United States, to subscribe to, purchase and vote not less than

a majority of the capital stock of any such corporation, and to do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of the said Act. Acting pursuant to the authority conferred upon it by the said Section of the aforesaid Act, the said Shipping Board, concluding that the formation of a corporation was necessary to carry out the purposes of the Act, caused this defendant to be incorporated on the 16th day of April, 1917 under the laws of the District of Columbia with an authorized capital stock of $50,000,000.00, and, in behalf of the United States, subscribed to and purchased all of said capital stock, which was paid for by the United States, and ever since the formation of said corporation the said Shipping Board, through its designated representatives, has voted the said stock at all meetings of the stockholders thereof. That thereafter by resolutions
87 duly adopted by the said Shipping Board, pursuant to authority vested in it by the said Act of Congress and the amendments thereto, and by the Merchant Marine Act, approved June 5, 1920, the said Shipping Board duly constituted the defendant its instrumentality and the instrumentality of the United States with full power to act for the United States in all and singular the matters referred to in and covered by the telegraphic messages averred in the declaration herein and set out in the particulars of demand annexed thereto.

The defendant avers that it is and at all times herein pertinent has been by law and by executive orders of the President of the United States and by the aforesaid resolution of the Shipping Board, acting solely as the instrumentality of the United States Shipping Board and of the United States and in no other capacity whatever, and that all the aforesaid telegraphic messages were transmitted and received in pursuit of such authority and exclusively in the course of its employment as such agent and instrumentality, of all of which the plaintiff at all times had full knowledge and notice.

The defendant avers that the plaintiff, the Western Union Telegraph Company, did accept from and transmit at the instance of the defendant throughout the period pertinent to this cause and long anterior thereto, that is, continuously from the time of its creation, telegrams on a form captioned "Official Telegram—Government Rate", which caption bore the name of the plaintiff, to wit "Western Union", and the name of the defendant, to wit, "United States Shipping Board Emergency Fleet Corporation," in contra-
88 distinction to the commercial-rate form, which bore the caption "Western Union Telegram", the plaintiff accepting said forms and transmitting said telegrams at Government rates for several years, to wit, continuously and without objection, or protest, until the present issue arose in June, 1922.

The defendant avers that the United States Shipping Board is and has been continuously since its creation an independent department of the Government of the United States and that the plaintiff has for many years and without objection afforded the said Board, as well as each and every other independent department of the Government, the Government rates hereinbefore averred for the transmission of messages.

The defendant avers that all its acts including the telegraphic messages referred to in the declaration and set out in the particulars of demand annexed thereto were done and performed by it solely as the corporate agency and instrumentality of the Government and in the exercise by it of the sovereign powers of the Government, duly delegated to it as aforesaid.

The defendant avers that the statement in the declaration that the messages therein referred to were transmitted and delivered by the Telegraph Company for and at the request of the Fleet Corporation is true in fact, and the computation of the amount of charge which is or would be due therefor at the commercial rate is correct, except that the enumeration of messages set forth in the particulars of demand annexed to the declaration herein and the charges in respect to said messages are subject to these corrections, that certain items therein should be charged against others than the Fleet Corporation, and certain other items are duplicate charges, and there-
89 fore there should be eliminated from the June, 1922, domestic bill, charges totaling the sum of $4.67, and from the July, 1922, domestic bill, charges totaling $3.02.

The defendant avers that the charges at the Government rate upon the messages set forth in the said particulars of demand, after making the eliminations last referred to, are as follows: for the month of June, 1922, domestic, $636.15; June, 1922, cable $180.87; July, 1922, domestic, $204.69.

The defendant avers that since the filing of the declaration herein, and on or about January 25, 1923, the Fleet Corporation has paid to the Telegraph Company the charges aforesaid at the Government rate, without prejudice to the contentions of either party hereto.

The defendant admits and avers that the items set forth in the particulars of demand annexed to the declaration are correct, as above rectified, with the exception that each item states the legal commercial rate instead of stating, as this defendant avers it should state, the legal Government rate, which legal Government rate is, and at the herein pertinent times was forty (40) per centum of each respective amount in the said particulars of demand.

CHAUNCEY G. PARKER,
E. M. ALLISON, Jr.,
E. M. ALLISON, Jr.,
GEOFFREY GOLDSMITH,
GEOFFREY GOLDSMITH,
Attorneys for the U. S. S. B. E. F. C.

January 10, 1923.

(Endorsed:) File. Wendell P. Stafford, Justice.

90 *Joinder in Issue.*

Filed January 23, 1923.

* * * * * * *

Comes now the plaintiff by its attorney and joins issue upon the defendant's pleas herein.

PAUL E. LESH,
Attorney for Plaintiff.

(Endorsed:) File. Wendell P. Stafford, Justice.

Stipulation Waiving Jury.

Filed January 23, 1925.

* * * * * * *

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and hereby agree to submit the same to the court, to be tried and determined without the intervention of a jury.

PAUL E. LESH,
Attorney for the Plaintiff.
E. M. ALLISON, Jr.,
Special Counsel;
GEOFFREY GOLDSMITH,
Assistant Counsel,
Attorneys for the Defendant.

91 Supreme Court of the District of Columbia.

Monday, March 16th, 1925.

Session resumed pursuant to adjournment, present presiding Mr. Justice Stafford.

* * * * * * *

Comes now the plaintiff herein by its attorney of record in open Court and moves for judgment, and said motion be and is hereby granted by the Court. Wherefore it is considered that plaintiff recover of defendant the sum of fourteen Hundred and Seven Dollars and Fifty Nine Cents ($1,407.59) with interest on Eleven Hundred ($1,100) Dollars and Thirty Five Cents from the 1st day of July, 1922, and on Two Hundred and Ninety Eight Dollars and Twenty Four Cents from the 1st day of August, 1922, together with his costs of suit to be taxed by the Clerk and have execution thereof. From the foregoing judgment the defendant notes an appeal in open Court to the Court of Appeals. Whereupon the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the Clerk in lieu thereof.

Tuesday, March 31st, 1925.

Session resumed pursuant to adjournment, present presiding Mr. Justice Stafford.

* * * * * * *

The Court this day having signed the Bill of Exceptions taken at the trial of this cause now hereby orders the same made of record.

92 *Assignments of Error.*

Filed March 31, 1925.

* * * * * * *

Comes now the defendant in the above entitled cause and assigns the following errors committed by the Court on the trial thereof, and upon which the defendant will rely for a reversal of the judgment appealed from:

1. The Court erred in denying the motion of the defendant to render and enter judgment in its favor.
2. The Court erred in making its finding and decision numbered 1.
3. The Court erred in making its finding and decision numbered 2.
4. The Court erred in making its finding and decision Numbered 3.
5. The Court erred in granting the motion of the plaintiff to render and enter judgment for the plaintiff for the amounts stated in the bill of exceptions herein or for any amount.
6. The Court erred in rendering and entering judgment for the plaintiff for the amounts named therein or for any amount.

E. M. ALLISON, JR.,
GEOFFREY GOLDSMITH.
Attorneys for Defendant.

Dated March 31st, 1925.

Memorandum.

April 2, 1925.—$50 deposited in lieu of undertaking on appeal.

93 *Designation of Record.*

Filed March 31, 1925.

* * * * * * *

The Clerk of the Court will please prepare a transcript of record on appeal in the above entitled cause containing the following:

1. The declaration (from which omit all excepting first two and last pages of "Particulars of Demand").
2. The pleas.
3. Joinder in Issue.
4. The stipulation waiving jury.
5. The Judgment.
6. The notation of appeal.
7. The notation of deposit in lieu of appeal undertaking.
8. The agreed statement of facts.
9. Memorandum of settlement of the bill of exceptions.

10. The assignments of error.
11. This designation.

E. M. ALLISON, JR.,
GEOFFREY GOLDSMITH,
Attorneys for Defendant.

Dated March 31st, 1925.

Approved March 31st, 1925.

PAUL E. LESH,
Attorney for Plaintiff.

94 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 93, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 67088 at Law, wherein The Western Union Telegraph Company is Plaintiff and The United States Shipping Board Emergency Fleet Corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of April, 1925.

[Seal of Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

LMG.

95 In the Supreme Court of the District of Columbia.

At Law.

No. 67088.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,

vs.

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant.

Bill of Exceptions.

Be it remembered that on the twenty-third day of January, A. D. 1925, this cause came on for trial upon the issues joined herein, in this Court, the honorable Wendell P. Stafford, justice, presiding, and was tried and determined by the Court without the intervention

of a jury; the parties by their attorneys of record having filed with the Clerk a stipulation in writing waiving a jury. Upon the trial thereof the following proceedings were had:

The case was tried upon an agreed statement of facts theretofore filed and appearing elsewhere in the record herein. There was no evidence offered. The Court found the facts to be in accord with said agreed statement.

Thereupon, the defendant, by its counsel, moved the Court, upon the facts so agreed upon and found, to render and enter judgment for the defendant, which motion was by the Court denied, to which ruling of the Court counsel for the defendant then and there excepted, which exception was by the Court duly allowed.

In ruling upon defendant's motion for judgment and, contrary to the defendant's contentions in support thereof, the Court decided and found

1. That the defendant was not during any of the period of
96 time mentioned in the declaration herein and is not a department of the Government of the United States within the meaning of Section 2 of the Act of Congress approved July 24, 1866, Chapter CCXXX, 39th Congress, Sess. 1, as amended, Revised Statutes, Sec. 5266.

2. That for the services rendered by the plaintiff in transmitting over its telegraph lines for the defendant the telegraphic messages here involved, the defendant is obligated to pay the usual commercial rates and is not entitled to the benefit of the reduced rates fixed by the Postmaster General pursuant to said Act.

3. That the rates applicable to the telegraphic service rendered to the defendant by the plaintiff for which claim is made herein, are established and fixed by law, and no agreement, custom or course of dealing exists having the effect of varying the rates applicable to the messages of the defendant corporation.

To each of the foregoing findings, numbered 1, 2, and 3, counsel for the defendant then and there separately excepted, which exceptions were by the Court duly allowed.

Thereupon the plaintiff, by its counsel, moved the Court to render and enter judgment for the plaintiff and against the defendant in the sum of $1,407.59, with interest on $1,109.35 from July 1st, 1922 until paid, and on $298.24 from August 1st, 1922 until paid, which motion was by the Court granted, and to the action of the Court in granting the same, counsel for the defendant then and there excepted, which exception was by the Court duly allowed.

Thereupon, and on the 16th day of March, A. D. 1925, judgment was accordingly rendered and entered, as appears elsewhere in the record herein, to the rendition and entry of which judgment counsel for the defendant then and there excepted, which exception was by the Court duly allowed.

And thereupon, and as all of said exceptions were duly
97 noted and allowed as aforesaid and duly entered upon the minutes of the court, and because the matters and things hereinbefore recited are not matters of record, and in order to make the

same a part of the record herein, which is hereby ordered, so that the defendant may have its case reviewed on appeal, the defendant by its attorneys moves the court to allow, sign and seal this its bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the court; and thereupon the defendant tenders this, its bill of exceptions, and prays the court to allow, sign and seal the same, which is accordingly done, now for then, this 31st day of March, 1925.

Given under the hand and seal of the justice of said court, before whom said proceedings were had, this 31st day of March, A. D. 1925.

WENDELL P. STAFFORD, [SEAL.]
Justice.

Settlement of bill of exceptions in foregoing form is consented to by

PAUL E. LESH,
Attorney for Plaintiff.
E. M. ALLISON, JR.,
GEOFFREY GOLDSMITH,
Attorney for Defendant.

98 [Endorsed:] In the Supreme Court of the District of Columbia. Western Union Telegraph Company vs. United States Shipping Board Emergency Fleet Corporation. At Law. No. 67088. M. 75 P. 293. Bill of Exceptions. Filed —— —, 1925. —— ——, Clerk, by —— ——, Deputy Clerk. Paul E. Lesh, Attorney for Plaintiff. E. M. Allison, Jr., Geoffrey Goldsmith, Attorneys for Defendant.

Endorsed on cover: District of Columbia Supreme Court. No. 4322. The United States Shipping Board Emergency Fleet Corporation, appellant, vs. The Western Union Telegraph Company. Court of Appeals, District of Columbia. Filed Apr. 18, 1925. Henry W. Hodges, clerk.

(6149)

Tuesday, February 9th, A. D. 1926

No. 4322

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY

The argument in the above entitled cause was commenced by Mr. E. M. Allison, jr., attorney for the appellant, and was continued by Mr. Paul E. Lesh, attorney for the appellee, and was concluded by Mr. E. M. Allison, jr., attorney for the appellant.

In the Court of Appeals of the District of Columbia

No. 4322

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Appellee

OPINION

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices

VAN ORSDEL, *Associate Justice:* The Western Union Telegraph Company, plaintiff below, sued the United States Shipping Board Emergency Fleet Corporation for the sum of $1,407.59 with interest, being the unpaid difference between the Government rate and the Commercial rate on messages transmitted by the Telegraph Company for the Fleet Corporation during the months of June and July, 1922.

From a judgment in favor of the plaintiff, the defendant Shipping Board has appealed.

The case turns upon the construction of section 5266, Rev. Stat. U. S., as follows: "Telegrams between the several Departments of the Government and their officers and agents, in their trans-

6658—26

mission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

There is no controversy as to the service having been rendered and paid for by the Shipping Board at the Government rate. This suit is to recover the difference between the Government rate and the Commercial rate; hence the issue narrows itself to whether or not the Shipping Board is such an agency of a Department of the Government as will bring it within the provisions of the above statute. From an agreement entered into between the Shipping Board and the Telegraph Company, the present case seems to be a test one. It was stipulated, among other things, "that both parties will expedite to a final determination by the Supreme Court of the United States a proposed suit (the present suit) by the Telegraph Company to be brought in the Supreme Court of the District of Columbia against the Fleet Corporation, claiming compensation at the Commercial rate for transmitting certain messages from and to the Fleet Corporation, billed at Washington during the months of June and July, 1922."

It was also stipulated that pending the present suit, the Telegraph Company should render its bills showing the amount charged at the Commercial rate and also the amount charged at the prevailing Government rate; that the Fleet Corporation should promptly audit the bills, both at Commercial and Government rates, and when found correct pay the same at the Government rate, that pending the final determination of this suit, the payment of the bills at the Government rate and the receipt thereof by the Telegraph Company shall be without prejudice to the claim of the Telegraph Company for the balances which would be due it at the Commercial rate.

The Fleet Corporation was incorporated by the United States Shipping Board under the provisions of the Act of Congress of September 7, 1916, 39 Stats. 728, with a capital stock of $50,000,000, of which the Board, on behalf of the United States, might subscribe to and vote not less than a majority of the stock. All of the stock was thus subscribed by the Shipping Board. The act further provided that "The Board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein."

The object of the corporation, as stated in its certificate, is "the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing

necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said subchapter four (4), of the incorporation laws of the District of Columbia."

Following the declaration of War, Congress passed the Act of June 15, 1917, 40 Stat. 182, granting the President sweeping control over the expenditure of the "Emergency Shipping Fund." Among other things, the Act provided: "That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct."

The fact that following the passage of this Act the Fleet Corporation was used by the President to assist him in carrying out certain of the war powers imposed upon him by Congress, in no way changed it from the status of a private corporation, or relieved it from its obligations as such. In United States vs. Strang, 254 U. S. 491, the court, answering the contention that the Fleet Corporation is a mere agency or instrumentality of the United States for executing certain limited Governmental powers delegated to it by the President, and, therefore, not liable to suit, said: "The Corporation was controlled and managed by its own officers, and appointed its own servants or agents, who became directly responsible to it. Notwithstanding all its stock was owned by the United States, it must be regarded as a separate entity. Its inspectors were not appointed by the President nor by any officer designated by Congress. They were subject to removal by the Corporation only, and could contract only for it. In such circumstances we think they were not agents of the United States."

The liability of the Fleet Corporation to suit on contracts made through its agents and representatives has been up-held in many cases; notwithstanding the ownership of its stock by the Government and its peculiar relation to the Government, growing out of the War emergency, where it was used by authority of Congress as an agency of the President. Krichman vs. United States, 256 U. S. 363; Sloan Ship Yards Corporation vs. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549; Astoria Marine Iron Works vs. Fleet Corporation, 258 U. S. 549; Eichberg vs. Fleet Corporation, 51 App. D. C. 44; 273 Fed. 886.

In Commercial Pacific Cable Company *vs.* Philippine National Bank, 263 Fed. 218, the court had under consideration the liability of the Philippine National Bank to pay commercial rates on telegrams sent by the Bank and its officers and agents through the Bureau of Insular Affairs of the United States Government as an intermediary at government rates, with the statutory precedent as

mission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

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to transmission. Under the statute providing for the creation of the Bank, the Philippine Government was required to at all times own at least 51% of the stock of the Bank. At the time the suit was brought, it owned 85% of outstanding stock. The voting power of the stock was fixed in a committee consisting of the Governor-General, who is appointed by the President of the United States, the President of the Philippine Senate, and the Speaker of the Philippine House. The affairs of the Bank are managed by the Board of Trustees consisting of a President, Vice-President, and five elective members. The President and Vice-President are appointed by the Governor-General with the advice and consent of the Philippine Senate. The remaining five directors are elected in accordance with the general corporation law. The Attorney-General of the Philippines is attorney for the Bank; and the Auditor, appointed by the President, is ex officio auditor of the Bank. Power is lodged in the Governor-General, with the consent of the Senate, to remove certain officers of the Bank. Indeed, the Bank was organized as a Government agency to build up and advance the wealth of the Islands.

Judge Mayer, in his decision, reached the following conclusion: "In view of the foregoing and other provisions, it is argued that the interest of the United States is so inextricably mingled with the purposes and administration of the bank and the welfare of the Islands and their Government that the bank in effect is a Department or agent of the Government of the United States. But although in the complex problems attendant upon the administration of the Philippine Government, in the interest of its welfare and that of the United States, the bank has, of course, many close relations with the United States Government, nevertheless there may be private ownership to the extent of 49 per cent of the stock of the bank, and it is permitted to do and does do a commercial business for profit, like any other bank. A financial institution so constituted cannot be a 'Department' of the United States Government, or an 'agent' in the sense of section 5266 of the Post Road Act, supra."

This case is closely analogous to the one at bar. There, as here, the corporation was acting in many respects as an agency of a Department of the Government of the United States, but it was treated as a private corporation, and therefore not such a departmental agency as could avail itself of the provisions of the statute granting Government rates on telegrams. The underlying principle in the present case, as in the cases above cited, holding the Shipping Board liable to suit as a private corporation, was announced by Chief Justice Marshall in Bank of the United States *vs.* Planters Bank of Georgia, 9 Wheat. 904, as follows: "It is, we think, a sound principle, that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and

prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating Act."

It has been a settled principle of law in this country that where a state or the general Government descends from the plane of sovereignty and associates itself in a corporate capacity with private persons, it becomes in the eyes of the law a private person itself and is bound accordingly. Hall *vs.* Wisconsin, 103 U. S. 5; South Carolina *vs.* United States, 199 U. S. 437. In other words the mere fact that the United States owns stock in a corporation, does not vest the corporation with rights belonging to the Government in its sovereign capacity.

The Fleet Corporation is a distinct corporate entity through which the President acted in carrying out the war powers authorized by the Act of June 15, 1917, authorizing the President, among other things, "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." It also made provision for compensation in the event a contract was cancelled by the President or through any agency of the Government selected by the President for that purpose. It has been held, in the cases adjudging the Fleet Corporation to possess the functions of a mere private corporation, that the authority conferred upon the President to cancel contracts or authorize the cancellation through the Fleet Corporation in no way affects the liability of the Corporation to suit on its contracts in the courts.

While the service obtained from the Telegraph Company may in part have been employed in relation to Government business, it was the separate contractual obligation of the Corporation, totally independent of any direct authority derived from the President. It logically follows that no contract is here involved with which the President, in carrying out the provisions of the Act of 1917, was in any way concerned. The service was performed for the Corporation, and the mere fact that some of it may have been rendered in connection with Government business in no way effected the corporate status of the Fleet Corporation or converted it into either a Department of the Government of the United States or an agent or officer of a Department, within the purview of section 5266, Rev. Stat., supra.

The judgment is affirmed with costs.

Tuesday, June 1st, A. D. 1926

No. 4322, April Term 1926

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

per Mr. Justice VAN ORSDEL,
June 1, 1926.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, HENRY W. HODGES, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 69, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States Shipping Board Emergency Fleet Corporation, Appellant, vs. The Western Union Telegraph Company, No. 4322, April Term, 1926, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of July, A. D. 1926.

[SEAL] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

○

Supreme Court of the United States

Order allowing certiorari

Filed November 23, 1926

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

APRIL TERM, 1926

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Petitioner

v.

WESTERN UNION TELEGRAPH COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of United States Shipping Board Emergency Fleet Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia, entered in the above case June 1, 1926 (R. 64), affirming the judgment of the Supreme Court of the District of Columbia. (R. 53.)

QUESTIONS PRESENTED

There is no dispute as to the facts, as the case was tried without a jury (R. 53) upon an agreed statement (R. 5) without further testimony (R. 56). The case involves:

(1) A determination of the extent of the right of the Government of the United States to priority in transmission of telegraph messages paid for

with public funds and to a rate thereon fixed annually by the Postmaster General, pursuant to Section 5266 R. S. (originally "Post Roads Act," approved July 24, 1866, 14 St. L. 221):

(2) A determination whether such priority and "government rate" shall be accorded to the messages of petitioner in carrying out the duties and functions duly delegated by the United States Shipping Board pursuant to the Merchant Marine Act, 1920 (41 St. L. 988), where the cost of the messages is borne by public funds and not paid for out of corporate funds of the petitioner.

STATEMENT

Respondent, a New York corporation, sued petitioner in the Supreme Court of the District of Columbia to recover charges at the "commercial rate" for certain telegraph and cable messages despatched at the request of petitioner over respondent's lines during June and July, 1922. (R. 1.) After the suit was filed the sum due for such messages at the "government rate" was paid pursuant to a stipulation (R. 24, 25) and the case proceeded to recover the difference between the "commercial rate" and the "government rate," both parties agreeing that it should be expedited to a final determination by this Court as a test case. This stipulation was filed October 19, 1922, prior to the 1925 amendment of the Judicial Code, and when the questions involved were subject to review by this court as a matter of right.

The agreed statement of facts (R. 5) showed that all the messages in controversy concerned the activities of petitioner in carrying out the functions and duties (R. 14) delegated to it by resolution of the United States Shipping Board adopted September 30, 1921 (R. 30), pursuant to express authority contained in Sections 12 and 35 of the Merchant Marine Act, 1920, and that the form used for such messages bore the caption " Official Telegram—Government Rate." (R. 17.) Further, that continuously from the year 1867, when respondent filed its written acceptance of the restrictions and obligations imposed and required by the Act of July 24, 1866 (R. 6, sec. 6), up to May 23, 1922 (R. 6, sec. 4), respondent had accorded priority in transmission and the " government rate " as a matter of course, not only to those Executive Departments headed by a Cabinet Officer but also to numerous Government Boards, Commissions, Bureaus, and Corporations, including your petitioner (R. 18, 19, sec. 17).

Respondent contends (1), that petitioner was neither a department of the government, *nor an officer or agent thereof*, within the meaning of Section 5266 R. S.; and (2), that even though the first contention is held untenable some of the messages in controversy were not " between " the petitioner and another government department, its officers or agents, as provided in the statute, and as to such messages respondent is not obligated to extend priority or the " government rate " but is entitled to the " commercial rate," pursuant to the

Interstate Commerce Act, as amended. (Sec. 3, 38 St. L. 544) (R. 2, 6.).

Petitioner's position is:

1. That in despatching the messages in controversy, the petitioner was acting as an agent of a Department of the Government, within the meaning of Section 5266 R. S., by virtue of the authority duly delegated to petitioner by resolution of the United States Shipping Board as expressly contemplated and provided in Sections 12 and 35 of the Merchant Marine Act, 1920.

2. That respondent is obligated to accord priority and the " government rate " on all messages pertaining to the Government's activities which must be paid for from funds in the Treasury or otherwise which belong to the government and this obligation exists irrespective of whether such messages are interdepartmental altogether or are messages sent by or to a department of the Government, its officers and agents, to or by outside persons.

The trial court decided that respondent was entitled to recover the "commercial rate" on all of petitioner's messages and entered judgment for respondent in the sum of $1,407.59. (R. 53.) The Court of Appeals of the District of Columbia, in affirming the judgment of the trial court, after stating that "the mere fact that the United States owns stock in a corporation does not vest the corporation with rights belonging to the Government

in its sovereign capacity," concluded its opinion, as follows (R. 63):

> "While the service obtained from the Telegraph Company may in part have been employed in relation to Government business, it was the separate contractural obligation of the corporation, totally independent of any direct authority derived from the President. It logically follows that no contract is here involved with which the President, in carrying out the provisions of the Act of 1917, was in any way concerned. The service was performed for the Corporation, and the mere fact that some of it may have been rendered in connection with Government business in no way affected the corporate status of the Fleet Corporation or converted it into either a Department of the Government of the United States or an agent, or officer of a Department, within the purview of section 5266, Rev. Stat., supra."

The Court of Appeals mistook petitioner's contentions. The Act of 1917, under which the President acted, and referred to in the court's opinion, was repealed by the Merchant Marine Act, 1920. Your petitioner's actions were pursuant to the last-mentioned Act. No contention was made that the President was concerned at all or that petitioner was acting under authority derived from him.

Moreover, the Court of Appeals made no reference anywhere in its opinion to any of the provisions of the Merchant Marine Act, 1920, nor to the resolution of the United States Shipping

Board (R. 14, 30) delegating its duties and functions thereunder to petitioner, under which authority petitioner was acting in despatching the messages.

For the language of the statutes involved and a statement of additional facts, reference is made to the supporting brief included herein.

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals of the District of Columbia has decided a question of substance and public interest, affecting the revenues of the United States, which has not been but should be settled by the Court of last resort. The effect of the decision of said court is that the respondent may now disregard the settled and accepted construction placed upon a Federal statute for forty-nine years by the Government of the United States and by the respondent, who received substantial benefits under said statute, whereby respondent and other telegraph companies will be enabled to charge and collect, either directly or indirectly, from the revenues of the United States, a sum estimated by petitioner's auditors to be more than $267,000.00 in excess of the "government rate" provided for in said statute, for messages despatched subsequent to July, 1922, and will be enabled hereafter to deny priority to the transmission of petitioner's messages pertaining to the business of the government.

II

The Court of Appeals of the District of Columbia has decided a question of substance and great public interest relating to the construction of the Act of July 24, 1866 (14 St. L. 221, R. S. 5266), entitled an "Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes," the decision being to the effect that the United States is not entitled to the "government rate" or to priority in transmission of telegraph messages despatched by your petitioner. In making this decision the said Court of Appeals did not give proper effect to the provisions of the Merchant Marine Act, 1920, and particularly to Sections 12, 14, and 35 thereof, nor to 42 St. L. 444, and did not give proper effect to the applicable decisions of this court.

III

The ultimate decision of this test case will also determine whether respondent and other telegraph companies who have accepted the benefits of the Act of July 24, 1866, may deny those benefits to other agents of the Government, corporate and otherwise, which bear the same relation to the Government as that occupied by your petitioner.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judg-

ment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General,
CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board Emergency Fleet Corporation,
R. H. HALLETT,
Assistant Counsel, United States Shipping Board Emergency Fleet Corporation,
O. P. M. BROWN,
Special Counsel, United States Shipping Board,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

OPINION OF THE COURT BELOW

The decision of the trial court, Supreme Court of District of Columbia, will be found in the Bill of Exceptions. (R. 55, 56.) The opinion of the Court of Appeals of the District of Columbia will be found at pages 59–63 of the record.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was rendered on June 1, 1926, (R. 64). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 St. L. 936).

STATUTES INVOLVED

The Post Roads Act.—This Act (approved July 24, 1866, 14 St. L. 291) originally contained four Sections, and, with minor amendments, is now contained in Sections 5263 to 5269, Revised Statutes. This case involves particularly the construction of Section 5266, R. S., which provides as follows:

> "Telegrams between the several Departments of the Government *and their officers and agents* in their transmission over the lines of any telegraph company to which has been given the right of way, timber or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall an-

nually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section." (Italics ours.)

The Merchant Marine Act, 1920.—The pertinent sections of this Act approved June 5, 1920 (c. 250, 41 St. L. 988), are:

"SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the 'Shipping Act, 1916,' to the contrary notwithstanding."

"SEC. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the 'Shipping Act, 1916,' or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the pur-

poses of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts."

"SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation."

Acts providing for Accounting to United States.—**Sundry Civil Act, approved July 1, 1918 (40 St. L. 651), provided:**

> "The Secretary of the Treasury is authorized and directed to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation under such rules and regulations as he shall prescribe."

The Second Deficiency Act, approved March 20, 1922 (42 St. L. 444), provided:

> "The Comptroller General of the United States is authorized and directed to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation, in accordance with the usual methods of steamship or corporation accounting and under such rules and regulations as he shall prescribe. Such audit shall be effective commencing July 1, 1921, the date of the discontinuance of the audit required to be performed under the direction of the Secretary of the Treasury by the Act approved July 1, 1918."

Appropriation Acts.—The Sundry Civil Act, approved June 5, 1920 (41 St. L. 874), under the title "Shipping Board," provided:

> "The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges, and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the

following sources: (a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed $15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed $25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed $30,000,000 from ships sold during the fiscal year 1921."

The appropriation Acts of subsequent years contain similar provisions and may be found as follows: 41 St. L. 1367; 42 St. L. 29, 192, 635, 1227; 43 St. L. 521, 1198; and Pub. No. 141, 69th Cong.

THE FACTS

The following additional facts will be found in the agreed statement (R. 5) or are judicially known:

On June 8, 1867, respondent accepted the benefits and assumed the obligations of the Post Roads Act (14 St. L. 221) and thereby became obligated to give priority to "telegraphic communications between the several departments of the Government of the United States and their officers and agents" at the rates to be annually fixed by the Postmaster General, (R. 6). Respondent charges the public generally certain uniform rates, commonly called "commercial rates," in conformity with the Interstate Commerce Act, as amended (Sec. 3, 36 St. L. 544), but the Postmaster General has annually fixed the rates to be charged by respondent and

other telegraph companies for telegrams and cablegrams " between the several Departments of the Government and *their officers and agents.*" These " government rates " for the months of June and July, 1922, when the messages in this case were despatched, were 40% of the " commercial rates " for telegrams and 50% of the " commercial rates " for cablegrams, (R. 6).

The extent of respondent's obligations under this Act was questioned in a letter to the Postmaster General dated June 20, 1873, wherein respondent suggested that " the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at ' government rates ' • • • ." This letter was referred to the Attorney General (14 Op. A. G. 278, R. 19) who ruled that the only limitation applicable to a claim for the " government rate " is that " the telegraphing must be in cases where the rates are payable out of public moneys or are to be accounted for to the Government by the officer making the expenditure."

On May 23, 1922, respondent notified petitioner that thereafter the " government rate " and priority on all telegraphic communications sent or received by it would be denied and the " commercial rates " thereon demanded. (R. 18.) Following this notice bills were presented at the " commercial rates " for all messages transmitted during June

and July, 1922. On July 18, 1922, the Chairman of the United States Shipping Board requested the opinion of the Comptroller General as to whether petitioner should pay the bills so rendered by respondent at the "commercial rate." Thereupon the Comptroller General ruled (2 Comp. Gen'l Dec. 38) that the status of petitioner as an agent of the United States Shipping Board was fixed by Sections 12 and 35 of the Merchant Marine Act, 1920; that the status of the funds expended by petitioner is fixed by Section 14 of said Act and by the Acts of July 1, 1918 (40 St. L. 651), and of March 20, 1922 (42 St. L. 444); and that petitioner's telegrams are subject to the provisions of Section 5266 R. S. and the rates fixed by the Postmaster General thereunder. In accordance with this decision payment of said bills at "commercial rates" was refused and the present suit was instituted by respondent.

Petitioner is a corporation, organized by the United States Shipping Board, pursuant to the authority vested in said Board by Section 11 of Shipping Act, 1916, to carry out the purpose of said Act, and was incorporated under the laws of the District of Columbia on April 16, 1917, (R. 8). During the period from July 11, 1917, to June 5, 1920, petitioner acted as an agent of the United States, in carrying out the Government's emergency ship building, ship requisitioning and ship operation program, pursuant to delegations of

authority contained in Acts of Congress, numerous Executive Orders and resolutions of the United States Shipping Board, (R. 8, 9).

The Merchant Marine Act, approved June 5, 1920, repealed the Act of June 15, 1917, and emergency war legislation amendatory thereof (Sec. 2(a)), and conferred further broad governmental powers upon the United States Shipping Board, including the completion of the Government's construction program (Sec. 2(b)), the reconditioning and repair of the Government's ships and the operation thereof (Sec. 12) and the sale of the Government's merchant marine (Secs. 5, 6, 7) and other property acquired by the United States during the war emergency (Sec. 13).

During the period when the messages involved in this suit (R. 38 to 44) were sent petitioner's activities were exclusively those delegated to it by resolution of said Board duly adopted September 30, 1921, referred to in the petition herein (R. 14 and 30, 31, 32).

This Board resolution (R. 31) followed the intent and spirit of Section 35, Merchant Marine Act, by providing that the power and authority vested in the Board by said Act shall " be exercised *by it* through the United States Shipping Board Emergency Fleet Corporation," in numerous activities therein specifically set forth. All of the messages in controversy related to the activities so delegated to petitioner, (R. 18).

The revenues collected by petitioner on account of its delegated functions are revenues of the United States (Sec. 14, Merchant Marine Act), which are annually reappropriated by Congress, and since these revenues have been insufficient to cover petitioner's expenditures as such agent Congress has from time to time appropriated from the Treasury of the United States very large sums of money to be expended by the United States Shipping Board, through your petitioner, to cover the losses annually sustained by the Government in carrying out the provisions of the Merchant Marine Act. (Reference to these appropriation acts will be found on p. 12 of this brief.) Petitioner is obligated to account to the United States for all expenditures made from such appropriations because of its activities as such agent. (2nd Deficiency Act, 1922, approved March 20, 1922, 42 St. L. 444.) The Emergency Fleet Corporation had not, during the period here involved, any corporate funds; i. e., any funds belonging to it as a corporation. Payment for the telegrams is to be made out of funds belonging to the United States and appropriated by Acts of Congress.

SPECIFICATION OF ERROR TO BE URGED

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Court of Appeals of the District of Columbia are:

1. In failing to give proper weight to the practical construction placed upon the terms of a contract by the parties thereto and followed in a course of dealing over a period of forty-nine years.

2. In holding that respondent may be permitted to deny priority in transmission and the "government rate" on any messages which are to be paid for from public funds.

3. In holding that in sending the messages in controversy petitioner was not acting as an agent of the United States Shipping Board, a department of the Government within the meaning of Section 5266 R. S.

ARGUMENT

I

In sending the messages in controversy the Emergency Fleet Corporation was acting as an agent of a department of the Government within the meaning of the Post Roads Act.

The record establishes the fact that these telegrams were sent by the Emergency Fleet Corporation for the account of the United States and as an agent of the United States; that the cost of the messages is to be paid out of public funds; that such income as the Fleet Corporation collects is collected for the account of the United States and must be covered into the public Treasury, and that the expenditures of the Fleet Corporation are made out of moneys appropriated by Congress.

With respect to the language of the Post Roads Act, it may be said that in the interpretation of

contracts and statutes words are generally to be taken in their natural and ordinary significance. While the word " Department " is used in this Act, Congress no doubt intended to cover all branches, bureaus, and other establishments of the Government by whatsoever name designated. There is no reason to suppose that Congress intended to limit the application of the word to those main executive departments headed by cabinet officers. The Shipping Board is now composed of seven Commissioners appointed by the President with the advice and consent of the Senate, and Congress annually appropriates large sums of money from the Treasury for the Board's expenses and for its expenses in carrying out its duties and functions as provided in the Merchant Marine Act, 1920. If the Shipping Board is not a " Department," it would seem to follow that the Government's right to priority and the Government rate on messages sent by the Commerce Commission, Panama Canal, the Veterans' Bureau, and all the other numerous Governmental boards, commissions, bureaus, and judicial and legislative establishments which are not called Departments, could be denied by the respondent and by other telegraph companies.

We do not contend that the Emergency Fleet Corporation is a Department of the Government, but it is contended that the Shipping Board is a Department within the meaning of the Post Roads Act and that the Emergency Fleet Corporation in sending the messages was acting as an agent of

the Shipping Board. In the *Sloan-Astoria-Eastern Shore cases*, 258 U. S. 549, in passing upon the status of the petitioner under the Shipping Act, 1916, and the War Emergency Legislation, this court declared that petitioner was an agency of the Government; also in the *Lake Monroe case*, 250 U. S. 246, this court said that petitioner " was but an operating agency of the Board " and that " The Shipping Board had been established as a public commission with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds." Petitioner was also described as an operating agent of the Board in *U. S. v. Strang*, 254 U. S. 491, and as an instrumentality of the Government in *U. S. v. Walters*, 263 U. S. 15, 17, and 18; while in the *Freygang case*, decided with *Russell Motor Car Company v. U. S.*, 261 U. S. 514, this court held that in carrying out the war powers delegated to petitioner by the President, its status was no different from that of the Secretary of the Navy acting under a similar delegation (p. 524). If petitioner had the status of an agent of the United States Shipping Board, a Department of the Government, prior to enactment of the Merchant Marine Act, it does not seem arguable that petitioner was not also acting as such agent when the messages in controversy were despatched.

In Sections 12 and 35 of that Act (p. 10, 11 of this brief) Congress expressly authorized the Board to

carry out many of the duties and functions of the Board through the agency of the petitioner. By resolution duly adopted, the Board directed and authorized petitioner to carry on certain activities for the Board. The messages in question were despatched in connection with such activities. They must be paid for from public funds appropriated by Congress. These facts are undisputed and appear in the record.

If the activities of the Emergency Fleet Corporation here involved were conducted wholly on its corporate account, and the Treasury of the United States was only indirectly effected, through ownership of some stock in the Fleet Corporation, a different situation would be presented. The opinion of the Court below proceeds on the theory that this case was ruled by the doctrine announced by this court in *Bank of United States* v. *Planter's Bank of Georgia*, 9 Wheat. 904, and followed by the Court of Appeals of the Second Circuit in *Commercial Pacific Cable Company* v. *Philippine National Bank*, 263 Fed. 218. We think the Court below failed to distinguish between the relation the Government sustains to a corporation in which it is a mere stockholder and its relation as principal to a corporation employed as its agent. It is not contended here as it was in the *Philippine National Bank case*, that the ownership by the United States of stock in a corporation gives petitioner the right to claim priority in transmission and the Govern-

ment rave on the corporation's messages. It is not apparent how the statement in *Bank of United States* v. *Planter's Bank of Georgia*, with respect to the status of the Government as a stockholder, has any important bearing on this case.

The Post Roads Act does not by its terms make any distinction between the classes of activities in which the Government may send telegrams at the reduced rates fixed by the statute. The activities of the United States through the United States Shipping Board and the Emergency Fleet Corporation are, of course, public and in the public interest; otherwise it would not be lawful to conduct them at all. The United States does not and cannot hold property as a monarch may, for private and personal purposes. Under a republican form of government, the whole property of the Government is owned and held by the State for public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158, 159, 174. These activities are as much of a public nature and in the public interest as the operation of the Panama Canal and the collection of tolls therefrom. It is not essential to a public use that it be absolutely free and without a charge to anyone. The State may build a railroad and charge tolls for passengers and freight. It is, nevertheless, a public function which it is exercising, and the property is devoted to public uses. *Gibbons* v. *Ogden*, 9 Wheat. 694. That the ownership and operation of commercial vessels may be considered a proper

Governmental activity is disclosed in *Berizzi Bros. Co.* v. *Steamship Pesaro,* decided by this court June 7, 1926.

II

The Post Roads Act, properly construed, gives the United States the benefit of rates fixed by the Postmaster General where the cost of the messages is a direct charge against the Public Treasury without regard to the particular activity conducted by the Government.

Unless the operations which the United States is engaged in through the agency of the Shipping Board and the Emergency Fleet Corporation are of such a character that the contract contained in the Post Roads Act does not entitle the United States to the Government rate on messages sent in the conduct of those operations, the case is fairly within the terms of the Post Roads Act. If it be argued that the right of the United States to send messages at rates fixed by the Postmaster General, as prescribed in the Post Roads Act, is limited to messages in connection with activities which are strictly Governmental in their nature, it may be said that there is no express exception in the Post Roads Act, excluding from its operation any class of Government messages sent in any particular kind of activity in which the United States may lawfully engage. If the parties intended that the right to the reduced rates should be limited to telegrams sent in connection with purely sovereign

or strictly Governmental activities, the Act would have so provided. There is no reason why the court should read such an exception into the statute.

Moreover, it is confidently asserted that the promotion and maintenance of the American Merchant Marine to serve as a naval or military auxiliary in time of war or national emergency and to promote the growth of the foreign and domestic commerce of the United States, which is the purpose of the Merchant Marine Act as declared in its title and the opening paragraph, can not be considered a mere commercial or business venture in which the United States is engaging in a proprietary capacity. *U. S.* v. *Porto Rico Fruit Union*, 12 Fed. (2nd) 961–2.

The Government parted with something of value in the enactment of the Post Roads Act. In consideration of the property granted by the Government, it was given the right to transmit messages relating to Government business, at rates to be fixed by one of its officers, and the purpose of this provision was to make a saving for the public Treasury. There is nothing in the Act to justify the conclusion that this saving to the public Treasury should only be allowed where the activities of the United States were of a special or limited class.

In 1873, the Attorney General in an opinion to the Postmaster General (14 Op. A. G. 78) said that the test to the right of the Government rates

was whether "the tolls are to become a charge against the United States, payable out of the Treasury." In that case, the charges were paid by the United States Marshals out of moneys collected by them for fees, the net amount of which was coverable into the Treasury, and the Attorney General said that the payment of the higher rates would be "as much of a loss to the Treasury as though the money had been directly appropriated therefrom for that purpose."

The Post Roads Act constitutes a contract between the United States and the Telegraph Companies who have accepted its provisions, and it should be fairly construed to carry out the purposes of the parties. There has been a practical construction of the contract between the United States and this respondent which should be persuasive. The opinion of the Attorney General above referred to was rendered in a controversy between the Western Union Telegraph Company and the United States. Ever since that opinion was rendered, the principle therein announced has been applied by the parties in the construction of the Post Roads Act. From the time of the organization of the United States Shipping Board and the Emergency Fleet Corporation in 1917 until 1922, the respondent transmitted messages for the Fleet Corporation at Government rates without any suggestion that the Post Roads Act did not require it. A list of various Boards, Commissions, and Agencies of the Government to whose messages the Gov-

ernment rates have been applied, is set forth at page 19 of the record.

A minor question, raised by the fact that all of the messages were not sent by the Fleet Corporation to another agent or officer of the United States, is whether the Government must be both sender and receiver in order to be entitled to the Government rates. The practical construction has been the other way. If the language of a contract is indefinite or of doubtful construction, the practical construction placed upon it by the parties will generally be adopted by the Courts. *Topliff* v. *Topliff*, 122 U. S. 121.

This case is one in which the jurisdiction of this court may properly be exercised by the issuance of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General,
CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board Emergency Fleet Corporation,
RALPH H. HALLETT,
Assistant Counsel, United States Shipping Board Emergency Fleet Corporation,
O. P. M. BROWN,
Special Counsel, United States Shipping Board,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 113

UNITED STATES SHIPPING BOARD EMERGENCY FLEET Corporation, petitioner

v.

WESTERN UNION TELEGRAPH CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE PETITIONER

Upon the oral argument of this case on December 5, 1927, one of the members of the Court suggested that counsel for the petitioner file a supplemental memorandum setting forth certain portions of the record referred to on the argument. This memorandum is filed in accordance with that suggestion.

I. On page 14 of the record, in the agreed statement of facts which was adopted by the trial court as its findings (R. 56), it appears that (italics ours)—

> *During the period when the messages involved in this suit were sent and at all times subsequent thereto the Fleet Corporation*

operations have been exclusively the following: The management, operation, maintenance, repair and reconditioning of vessels; the establishment and operation of lines and routes of vessels; the completion or conclusion of construction work upon vessels; the sale of vessels; the operation and sale of housing projects, real estate, railroad and other similar property; the operation and sale of dry docks; the custody and sale of other property and materials; matters of accounting; insurance and matters pertaining to the same; the operation of pier and pier facilities; the disbursement and expenditure of all moneys arising out of operations, and of funds allotted to it from appropriations by Congress; the leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and for its terminal facilities; matters incidental to the foregoing, including the employment, compensation and removal of officers and employees, *and in doing the foregoing the Fleet Corporation has at all times since September 30, 1921, and until January 10, 1924, conformed to the directions with regard thereto contained in the resolution of the United States Shipping Board adopted September 30, 1921,* and since January 10, 1924, to those contained in the resolutions adopted that day by the said Board, copies of which resolutions are hereto attached marked Exhibits "E–1" and "E–2," respectively, and to be read and considered as parts hereof.

The resolution of the Shipping Board adopted September 30, 1921, was attached to the agreed statement of facts as an exhibit and is contained in the record at pages 30–32. The important portion thereof is the following (R. 31):

> *Be it further resolved,* That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall, until otherwise ordered by the Board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

Then follows an enumeration of activities with certain directions with respect thereto. This portion of the resolution, however, is clearly only in limitation of the portion quoted above, and the sole effect of the resolution was to delegate to the Emergency Fleet Corporation "the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920," with respect to the activities named. Of course the purpose of the Merchant Marine Act and later legislation was to strip the Fleet Corporation of all property and of all activity on its own corporate account and leave it only active as agent of the Shipping Board.

Even if these portions of the record do not show affirmatively that *all* of the Fleet Corporation's activities during the period in question were delegated activities, there can be no doubt that they do show affirmatively that some of its activities

were delegated and that the findings nowhere state that the Fleet Corporation had any activities which were not delegated.

On page 18 of the record, in the agreed statement of facts, it appears that—

> • • • continuously from the time of the organization of the Fleet Corporation until May 23, 1922, the Telegraph Company accepted all messages of the Fleet Corporation and charged for their transmission at the Government rate and gave them priority over commercial messages in transmission without questioning that the Fleet Corporation was entitled to the benefit of that rate with the right of priority in transmission. On or about the date last mentioned, the Telegraph Company caused a communication to be sent to the Fleet Corporation for the first time denying the applicability of the Government rate to all Fleet Corporation messages, and giving notice that the commercial rates would be thereafter applied to such messages.

It further appears that, during the period here in question the telegraphic messages of the Fleet Corporation were sent either on a form headed "Official Telegram—Government Rate—United States Shipping Board Emergency Fleet Corporation," or on the form provided for commercial rate messages but bearing additional words importing that they be sent at the Government rate (R. 17), and that this rate has been paid (R. 7).

Petitioner's contention is that even if the findings fail to show that all of the activities of the Fleet Corporation were in its capacity as agent for the Shipping Board, and if they fail to negative the possibility that some of its activities were on its own corporate account, the findings fail to support the judgment for the respondent, if messages of the Fleet Corporation sent as agent of the Shipping Board take the Government rate. The findings show (R. 17, Finding 16) that all the telegrams purported to be Government messages and in all of them the Fleet Corporation held itself out to be acting as a governmental agency and to be making the contracts for transmission of the messages on behalf of the Government. There was one legal rate for Government messages and another for private messages. The rate for the former was paid. The respondent is in the position of claiming that although the message was contracted for as a Government message, in fact the Fleet Corporation was acting in its own corporate behalf. The burden was on the respondent to show this, not on the Fleet Corporation to negative it.

II. On the oral argument counsel for petitioner referred to a written stipulation (R. 24) entered into by the parties hereto under date of October 19, 1922, providing that this should be a test case, that monthly bills for all messages from and after June, 1922, should be rendered at both the Government and the commercial rate, that they should be paid

at the Government rate, and that with respect to the accumulated monthly differences between the two rates the parties would settle their accounts in accordance with the final determination of this suit.

The importance of the present case is largely due to this stipulation. The amount actually involved in this suit is less than $2,000, but the final decision in this case may determine whether the Fleet Corporation is liable to pay the respondent very large sums and that is why it is hoped that the record may not be found deficient.

III. The defendant's plea was filed on January 23, 1925 (R. 45), four months after the agreed statement of facts, which was filed on September 3, 1924 (R. 5). While it is not contended that the plea can enlarge the agreed statement of facts, it may perhaps be resorted to as at least indicating the interpretation placed by the Fleet Corporation on any ambiguous portions of the statement of facts. The plea clearly set forth that all of the Fleet Corporation's acts during the period in question were performed as agent of the Government. For instance, the plea alleged:

> The defendant avers that it is and at all times herein pertinent has been by law and by executive orders of the President of the United States and by the aforesaid resolution of the Shipping Board, acting solely as the instrumentality of the United States Shipping Board and of the United States and in no other capacity whatever, and that

all the aforesaid telegraphic messages were transmitted and received in pursuit of such authority and exclusively in the course of its employment as such agent and instrumentality, of all of which the plaintiff at all times had full knowledge and notice. (R. 51.)

The defendant avers that all its acts including the telegraphic messages referred to in the declaration and set out in the particulars of demand annexed thereto were done and performed by it solely as the corporate agency and instrumentality of the Government and in the exercise by it of the sovereign powers of the Government, duly delegated to it as aforesaid. (R. 52.)

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board Emergency Fleet Corporation.

RALPH H. HALLETT,
Assistant Counsel, United States Shipping Board Emergency Fleet Corporation.

GARDNER P. LLOYD,
Special Assistant to the Attorney General.

O. P. M. BROWN,
Special Counsel, United States Shipping Board.

DECEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 113

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, petitioner

v.

WESTERN UNION TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The decision of the trial court, the Supreme Court of the District of Columbia, will be found in the Bill of Exceptions. (R. 55, 56.) The opinion of the Court of Appeals of the District of Columbia (R. 59–63) is reported in 13 F. (2d) 308.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on June 1, 1926. (R. 64.) Petition for certiorari was filed on August 30, 1926, and was granted on November 23,

1926. (R. 65.) The jurisdiction of this Court to issue the writ is found in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether the benefits of Section 5266, R. S., which provides for priority, at rates fixed by the Postmaster General annually, for "telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain," are applicable to telegrams sent by the petitioner in carrying out the duties and functions duly delegated to it by the United States Shipping Board pursuant to the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988).

STATUTES INVOLVED

The Post Roads Act (approved July 24, 1866, c. 230, 14 Stat. 221) originally contained four sections, which, with minor amendments, are now contained in Sections 5263 to 5266, Revised Statutes.

The title to the Act as passed originally was as follows:

> ***An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes.***

Section 5263, R. S. (U. S. C., Title 47, Sec. 1), provides:

> Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

Section 5264, R. S. (U. S. C., Title 47, Sec. 2), provides:

> Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its post, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each sta-

tion; but such stations shall not be within fifteen miles of each other.

Section 5266, R. S. (U. S. C., Title 47, Sec. 3), provides:

> Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

The pertinent provisions of the Merchant Marine Act relating to the functions of the Shipping Board and of the Fleet Corporation and the sections of Appropriation Acts providing public funds for the activities of the Shipping Board and Fleet Corporation are in the appendix.

STATEMENT

This suit was begun in the Supreme Court of the District of Columbia by this respondent, The Western Union Telegraph Company, against the petitioner to recover the commercial rate on telegrams transmitted by the respondent for the petitioner in June and July, 1922. After the suit was begun the government rate was paid without prejudice, leaving in dispute the difference between the gov-

ernment rate and the commercial rate, the controversy being whether telegrams sent by the Emergency Fleet Corporation are entitled to the government rate. Some of the messages were sent by the Fleet Corporation, its officers or agents, to other officers or agents of that corporation or to other departments or officials of the United States; some were sent by the Fleet Corporation, or its officers or agents, to persons who were not officers or agents of the Fleet Corporation or of any branch of the government of the United States. (R. 7.) The cost of sending all of the messages must be borne out of public funds appropriated by Congress.

The case was tried to a court without a jury (R. 53) on an agreed statement of facts (R. 5), adopted by the court as its findings (R. 56). The Supreme Court of the District entered a judgment for this respondent on the ground that all the messages took the commercial rate, which was affirmed by the Court of Appeals of the District.

On June 8, 1867, respondent accepted the benefits and assumed the obligations of the Post Roads Act, and thereby became obligated to give priority to "telegrams between the several Departments of the Government and their officers and agents" at rates to be annually fixed by the Postmaster General. (R. 6.) Respondent charges the public generally certain uniform rates, commonly called "commercial rates," in conformity with the Interstate Commerce Act, as amended (Sec. 400, c. 91, 41 Stat. 456, 474–475; U. S. C., Title 49, Sec. 1), but the Post-

master General has annually fixed the rates to be charged by respondent and other telegraph companies for telegrams and cablegrams "between the several Departments of the Government and their officers and agents." These government rates for the months of June and July, 1922, when the messages involved in this case were dispatched, were forty per cent of the commercial rates for telegrams and fifty per cent of the commercial rates for cablegrams. (R. 6.)

It appears from an opinion of the Attorney General (14 Op. A. G. 278, R. 19) that the extent of respondent's obligations under the Post Roads Act was questioned in a letter to the Postmaster General dated June 20, 1873, wherein respondent suggested that "the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at Government rates * * *." This letter was referred to the Attorney General who ruled that the only limitation applicable to a claim for the government rates is that "the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures."

From the date of the respondent's acceptance of the benefits and assumption of the obligations of the Post Roads Act, the respondent has extended the government rates for telegraphic messages, with

the right of priority in transmission thereof, to the Executive Departments headed by Cabinet Officers, to the judicial and legislative branches of the government, and to the following (with the exception with regard to the petitioner hereinafter stated) (R. 18–19):

Interstate Commerce Commission.
United States Shipping Board.
United States Shipping Board Emergency Fleet Corporation.
Federal Power Commission.
War Finance Corporation.
United States Railroad Administration.
Railroad Labor Board.
The Panama Canal.
The Federal Reserve Board.
The Federal Trade Commission.
United States Tariff Commission.
General Accounting Office.
Alien Property Custodian.
Civil Service Commission.
United States Bureau of Efficiency.
United States Employees' Compensation Commission.
Pan American Union.
Smithsonian Institution.
Inter-American High Commission—United States Section.
National Home for Disabled Volunteer Soldiers.
Government of the District of Columbia.
Veterans' Bureau.
Federal Board for Vocational Education.
United States Interdepartmental Social Hygiene Board.

Continuously from the time of the organization of the petitioner until May 23, 1922, the respondent accepted all messages of the petitioner and charged for their transmission at the government rates and gave them priority in transmission over commercial rates, without questioning that the petitioner was entitled to the government rates and priority. On or about May 23, 1922, the respondent sent a communication to the petitioner for the first time denying the applicability of the government rates to all Fleet Corporation messages, and giving notice that the commercial rates would be thereafter applied to such messages. (R. 18.) Following this notice, bills were presented at the commercial rates for all messages transmitted during June and July, 1922. On July 18, 1922, the Chairman of the United States Shipping Board requested the opinion of the Comptroller General as to whether petitioner should pay the bills so rendered by respondent at the commercial rates. Thereupon the Comptroller General ruled (2 Comp. Gen. Dec. 38) that the status of petitioner as an agent of the United States Shipping Board was fixed by Sections 12 and 35 of the Merchant Marine Act, 1920; that the status of the funds expended by petitioner was fixed by Section 14 of said Act and the various Acts making direct appropriations for its expenses, etc.; and that petitioner's telegrams were subject to the provisions of Section 5266, R. S., and the rates fixed by the Postmaster General thereunder. In accord-

ance with this decision, payment of said bills at the commercial rates was refused and the present suit was instituted by respondent.

After the filing of the declaration herein the petitioner paid the respondent for the messages in question at the government rates, pursuant to stipulation and without prejudice to the contentions of either party hereto, so that the suit is now a claim for the unpaid difference between the government rates and the commercial rate on the aforesaid messages. (R. 7.)

Petitioner is a corporation, organized by the United States Shipping Board pursuant to the authority vested in said Board by Section 11 of the Shipping Act, 1916 (c. 451, 39 Stat. 728, 731; U. S. C., Title 46, Sec. 810), to carry out the purpose of said Act, and was incorporated under the laws of the District of Columbia on April 16, 1917. (R. 8.) During the period from July 11, 1917, to June 5, 1920, petitioner acted as an agent of the United States, in carrying out the government's emergency ship building, ship requisitioning, and ship operation programs, pursuant to delegations of authority contained in Acts of Congress, Executive Orders and resolutions of the United States Shipping Board. (R. 8, 9.)

The Merchant Marine Act, 1920 (Act June 5, 1920, c. 250, 41 Stat. 988), repealed certain sections of former Acts and amended other sections of such Acts. Section 4 provided for a transfer to the

Shipping Board of all vessels and other property or interest of whatsoever kind acquired by the President through any agency whatsoever in pursuance of the Acts referred to in the section, with the exception of vessels and property the use of which was, in the opinion of the President, required by any other branch of the government service, and of vessels in the military or naval service of the United States. Section 5 authorized and directed the Board to sell, as soon as practicable, all of the vessels referred to in Section 4, or otherwise acquired by the Board. Section 7 authorized and directed the Board to investigate and determine what steamship line should be established, and to sell or charter vessels to responsible citizens who would agree to establish such lines, or to operate vessels on such lines temporarily in case sales or charters for that purpose could not be made. Section 12 provided that vessels might be reconditioned and kept in suitable repair, and, until sold, should be managed and operated by the Board or chartered or leased by it, and that the United States Shipping Board Emergency Fleet Corporation should continue in existence and have authority to operate vessels until all vessels were sold. Section 35 provided that the power and authority vested in the Board by the Act, except as therein otherwise specifically provided, might be exercised directly by the Board or by it through the Emergency Fleet Corporation.

A resolution of the Shipping Board adopted September 30, 1921, provided that the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, should, until otherwise ordered by the Board, "be exercised by it through the United States Shipping Board Emergency Fleet Corporation" in various activities specifically set forth in the resolution. (R. 30–31.) The resolution related solely to the delegation of authority to the Emergency Fleet Corporation in connection with certain activities which the Merchant Marine Act authorized the Shipping Board to carry on, and contained no reference of any kind to any activities of the Fleet Corporation which it, as a corporate entity, was empowered to carry on as principal and not as mere agent of the Shipping Board.

It appears from the agreed statement of facts (R. 14) that during the period when the messages involved in this suit were sent, and at all times subsequent thereto, the operations of the Fleet Corporation have been exclusively certain designated activities corresponding to the activities specifically delegated to it by the resolution of the Shipping Board dated September 30, 1921, and that "in doing the foregoing the Fleet Corporation has at all times since September 30, 1921, and until January 10, 1924, conformed to the directions with regard thereto contained in the resolution of the United States Shipping Board adopted September 30, 1921." Since, as pointed out above, the resolution of September 30, 1921, contained no directions with

regard to any activities of the Emergency Fleet Corporation other than those carried on by it as agent of the Shipping Board under authority delegated by the Board, the statement in the agreed statement of facts that in all of its operations the Fleet Corporation conformed to the directions with regard thereto contained in the resolution, amounts to an assertion that during the time in question the Fleet Corporation carried on no operations in which it as a corporate entity was principal, and that all of its operations were performed as agent of the Shipping Board.

Section 14 of the Merchant Marine Act, 1920, provided that after July 1, 1921, the net proceeds derived by the Shipping Board from activities authorized by the Act, or by earlier Shipping Acts, less such an amount as might be authorized annually by Congress to be withheld as operating capital, and less such sums as might be needed for the insurance and construction loan funds provided for by other sections of the Act, should be covered into the Treasury of the United States as miscellaneous receipts. Congress has annually reappropriated such revenues, and since they have been insufficient to cover petitioner's expenses as agent of the Shipping Board, Congress has from time to time appropriated additional large sums of money for such expenses. (E. G. Act June 5, 1920, c. 235, 41 Stat. 874; Act March 4, 1921, c. 161, 41 Stat. 1367; Act August 24, 1921, c. 89, 42 Stat. 192; Act June 12, 1922, c. 218, 42 Stat. 635.)

SPECIFICATIONS OF ERROR TO BE URGED

Petitioner urges that the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District and—

1. In holding that in sending the messages in controversy petitioner was not acting as an agent of the United States Shipping Board, a department of the government within the meaning of Section 5266, R. S.

2. In holding that respondent may be permitted to deny priority in transmission and the government rates on any messages which are to be paid for from public funds.

3. In failing to give proper weight to the practical construction placed upon the terms of a contract by the parties thereto and followed in a course of dealing over a period of many years.

SUMMARY OF ARGUMENT

The words "Departments of the Government," as used in Section 5266, R. S., include all branches, bureaus, and other establishments of the government, and do not refer only to those main executive departments which are headed by cabinet officers. There is no reason to suppose that Congress intended that the words should be given a restricted meaning, and the construction of the Act adopted by the parties ever since its passage is against such a meaning.

It follows that the Shipping Board is a department of the government within the meaning of Sec-

tion 5266, R. S. The record shows that the Emergency Fleet Corporation, in sending the messages here involved, was not acting for its own corporate account, but was acting merely as an agent of the Shipping Board under authority delegated pursuant to the Merchant Marine Act, 1920.

It is immaterial that the Fleet Corporation can act only through an officer or agent, and that where an employee of the Fleet Corporation performs acts lawful for an agent of the Fleet Corporation but unlawful for an agent of the United States he is not to be regarded as an agent of the United States for purposes of determining whether he has violated a criminal statute. The acts of the officers and agents of the Fleet Corporation, duly authorized, in connection with activities delegated to the Fleet Corporation by the Shipping Board, are the acts of the Fleet Corporation itself as agent of the Shipping Board.

The activities of the Fleet Corporation here involved, consisting under the Merchant Marine Act of disposition of shipping property acquired by the government for war purposes and operation of vessels to such extent as might be necessary in order to establish and maintain an adequate merchant marine, were governmental in character. In any event, Section 5266, R. S., makes no distinction between governmental and commercial activities. Its purpose is to effect a saving for the public treasury, and the United States and the respondent have construed it for many years as being applicable to

all messages the cost of which is a charge against the public treasury.

Section 5266, R. S., should be construed as applicable to telegrams to or from outside parties, not connected with the government, if the cost thereof is a charge against the public treasury. This has been the construction acted upon by the parties hereto for many years. Where the government bears the expense of a message sent by one of its agents to a private individual as it does in the case of a message sent by him to another agent of the government, the purpose of the statute requires that it be equally applicable to both messages. The debates in the Senate on the bill which finally became the Post Roads Act show that it was the intention of Congress that the rates fixed by the Postmaster General should be applicable to all governmental messages paid for out of public funds.

ARGUMENT

I

IN SENDING THE MESSAGES IN CONTROVERSY THE EMERGENCY FLEET CORPORATION WAS ACTING AS AN AGENT OF A DEPARTMENT OF THE GOVERNMENT WITHIN THE MEANING OF THE POST ROADS ACT

While the section of the Post Roads Act, now known as Section 5266, R. S., refers to telegrams between "the several Departments of the Government and their officers and agents," it seems clear that the word department was intended to include

all branches, bureaus, and other establishments of the government, and was not intended to refer only to those main executive departments which are headed by cabinet officers. There is no reason to suppose that Congress intended that the word "Department" should be given such a restricted meaning that the benefits of the Post Roads Act would depend on the form of the executive organization through which any particular governmental activities were carried on. It is more logical to suppose that the Post Roads Act contemplated that all governmental activities should be entitled to the benefits of the Act. That this has been the construction of the Act adopted by the parties ever since its passage is apparent from the record. Priority in transmission of messages and the government rate have been granted by the respondent to numerous governmental boards, commissions, and bureaus, as well as to the judicial and legislative branches of the government. (R. 18–19.)

It follows that the Shipping Board is a department of the government within the meaning of Section 5266, R. S. Moreover, in its brief in opposition to the petition for certiorari, the respondent expressly disclaimed that it contended that the Shipping Board was not such a department of the government.

The Shipping Board, then, being a department of the government, the further question is whether the Emergency Fleet Corporation was acting as an agent of the Shipping Board in sending the mes-

sages involved in this case. We do not contend that the Emergency Fleet Corporation is itself a department of the government. Nor do we contend that because the Emergency Fleet Corporation is, in a broad sense, an operating agency or instrumentality of the government, which owns all of its capital stock (*The Lake Monroe*, 250 U. S. 246, 254; *United States* v. *Strang*, 254 U. S. 491, 493; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549, 567; *United States* v. *Walter*, 263 U. S. 15, 18; *United States ex rel. Skinner & Eddy Corpn.* v. *McCarl*, decided by this Court October 10, 1927), the Fleet Corporation is entitled to priority in transmission and the government rate for messages sent by it on its corporate account. If the activities of the Fleet Corporation here involved had been conducted wholly on its corporate account, and the United States were interested only as a stockholder of the Fleet Corporation, the situation presented would differ from that presented by the record in this case, and it may be that the case would be governed by *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, and *Commercial Pacific Cable Co.* v. *Philippine National Bank*, 263 Fed. 218, upon which the Court of Appeals relied.

We think the court below failed to take into consideration that in this case the record shows that the Emergency Fleet Corporation was not acting for its own corporate account, but was acting

merely as an agent of the Shipping Board. pointed out in the Statement in this brief, appears from the agreed statement of facts t during the period when the messages involved this suit were sent the Fleet Corporation in all its activities "conformed to the directions w regard thereto contained in the resolution of United States Shipping Board adopted Septem 30, 1921," which resolution related only to the de gation to the Fleet Corporation of certain activit authorized by the Merchant Marine Act, 19 (R. 14, 30–32.) We believe this can be constru only as meaning that during the period in quest all of the activities of the Fleet Corporation w delegated activities, performed as agent of Shipping Board.

Respondent has argued that the Fleet Corpo tion can send a telegram or do any other act o through an officer or agent; that this Court has h in *United States* v. *Strang*, 254 U. S. 491, that agent of the Fleet Corporation is not an agent the United States; and that to hold that the age of the Fleet Corporation who sent the telegra here in question were agents of a department of government in sending such telegrams would the fore involve a reconsideration of the quest decided by this Court in *United States* v. *Strang*

In *United States* v. *Strang* the sole question fore the Court was whether an employee of

Fleet Corporation was an officer or agent of the United States within the meaning of Section 41 of the Criminal Code, which prohibited anyone personally interested in a corporation, joint-stock company, association, or firm from acting as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. The Court was called upon to construe a criminal statute and followed the rule of strict construction applicable to such cases.

We do not question that an employee of the Fleet Corporation is primarily an agent of the Fleet Corporation, and not of the United States, or that, as held in *United States* v. *Strang*, where such employee performs acts lawful for an agent of the Fleet Corporation but unlawful for an agent of the United States, he is not to be regarded as an agent of the United States for purposes of determining whether he has violated a criminal statute. But it does not follow that where the Fleet Corporation, through an employee duly authorized, performs acts which the United States has delegated to it, such acts are not performed by it as agent of the United States.

Respondent's argument must go to the length of contending that a corporation can never act as an agent of the United States. A corporation can act only through its officers and agents, and therefore

when Congress authorized the Shipping Board to perform certain activities by utilizing the Fleet Corporation as its agent, it must have contemplated that the Fleet Corporation would act through its officers and agents; and that the acts of such officers and agents, duly authorized, would be the acts of the Fleet Corporation itself as agent of the Shipping Board.

In *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549, 567, this Court recognized that the Fleet Corporation might act as an agent of the United States, although it was held that under the circumstances there disclosed the Fleet Corporation might be sued because it was in no better position to claim immunity from suit than an individual agent would have been, and the Court said of such an individual agent that—

> An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his act.

Other cases in which it has been recognized that the Fleet Corporation may act as an agent of the United States are *Ingram Day Lumber Company* v. *United States S. B. E. F. Corp.*, 267 Fed. 283, 287–288; *Astoria Marine I. Works* v. *United States Ship. Board*, 295 Fed. 415; *United States Ship. B. E. F. Corp.* v. *Galveston Dry Dock & C. Co.*, 13 F. (2d) 607, 611–612.

II

THE ACTIVITIES OF THE EMERGENCY FLEET CORPORATION HERE INVOLVED WERE GOVERNMENTAL IN CHARACTER, AND IN ANY EVENT THE UNITED STATES IS ENTITLED TO THE BENEFITS OF THE POST ROADS ACT FOR ANY MESSAGES THE COST OF WHICH IS A DIRECT CHARGE AGAINST THE PUBLIC TREASURY, WITHOUT REGARD TO THE CHARACTER OF THE PARTICULAR ACTIVITIES TO WHICH THE MESSAGES RELATE

Respondent has argued that the activities of the Emergency Fleet Corporation are commercial and not governmental in character, and that the preferential government rate ought not to be extended to commercial activities in which persons other than the government may engage. Respondent suggests that the distinction between government and business is that government is necessarily exclusive, while business may be competitive.

Whatever may be the case with respect to activities of the Emergency Fleet Corporation on its corporate account, it can hardly be doubted that its activities as agent of the United States are governmental in character. The United States does not and can not hold property, as a monarch may, for private and personal purposes. Under a republican form of government, the whole property of the government is owned and held by it for public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158, 174; *Light* v. *United States*, 220 U. S. 523;

Ches. & Del. Canal Co. v. *United States*, 250 U. S. 123.

That the activities of the Emergency Fleet Corporation as agent of the United States were governmental becomes even clearer from an examination of the Merchant Marine Act, 1920, and the circumstances under which it was passed. For war purposes the government had obtained a great number of ships and property for use in connection with shipping. The operation of these ships in commercial transportation in connection with the government's war activities was undoubtedly a governmental function. *United States* v. *Porto Rico Fruit Union*, 12 F. (2d) 961. After the war some disposition of the vast amount of property which had been acquired was necessary. Section 1 of the Merchant Marine Act, 1920, provided:

> That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; * * *.

Section 7 authorized and directed the Shipping Board to investigate and determine what steamship lines should be established and put in operation, and

the kind of vessels to be employed thereon, and then provided:

> * * * The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. * * *

It is apparent that the Merchant Marine Act contemplated, not that the government should compete with citizens in the shipping business, but only that the government should dispose of the shipping property acquired by it for war purposes and should supplement the shipping business carried on by citizens to such extent as might be necessary in order to establish and maintain an adequate merchant marine.

And even if the government had determined to go into the shipping business in competition with citizens, its activities therein would have been governmental. In *Berizzi Bros. Company* v. *S. S. Pesaro*, 271 U. S. 562, the *Pesaro* was owned, possessed, and operated for trade purposes by the Italian Government. She was libeled *in rem* in the United States District Court for the Southern District of New York. That court dismissed the libel for want of jurisdiction, on the ground that the vessel was immune from process of the courts of the United States. This Court, in affirming the judgment of the District Court, said (page 574):

> We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

But while we have thought that we should not leave unchallenged respondent's suggestion that the activities of the Emergency Fleet Corporation here involved were commercial and not governmental in character, there is nothing in Section 5266, R. S., which makes the benefits of that section

dependent on the character of the activities to which any particular messages relate. The section by its terms applies broadly to all messages "between the several Departments of the Government and their officers and agents." There is nothing to suggest an exception with respect to messages sent in connection with activities not strictly governmental in character and no reason why such an exception should be implied.

By the Post Roads Act the government gave telegraph companies valuable rights. In return it was to receive the right to transmit messages at rates to be fixed by one of its officers. The purpose of this provision must have been to effect a saving for the public treasury, and the character of particular messages has nothing to do with such saving.

Looking, therefore, to the purpose of Section 5266, R. S., it should be applicable to all messages from or to officers or agents of the United States the cost of which is a charge against the public treasury, and this has been the practical construction placed upon the section by the United States and the respondent for many years.

In 14 Op. A. G. 278 it appeared that the then president of the respondent had written to the Postmaster General in part as follows:

> A district attorney of the United States applied for an order directing that his messages relating to his official business be received and payment accepted at Government rates. I expressed the opinion that

> the rates which the Postmaster General is authorized to fix are applicable only to communications exchanged between the several Departments of the Government and their officers and agents, and not upon communications between such agents directly. But as such a construction, if accepted, would be difficult to enforce, I suggested that the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at Government rates; but if, as in the case of a United States marshal or attorney, the disbursements for telegraphing are payable out of official fees or commissions or from the proceeds of penalties or forfeitures, then the Government rates should not apply.

The Attorney General, after pointing out that district attorneys and marshals were required to account for all fees received by them and to pay over the same into the Treasury of the United States, retaining therefrom a compensation fixed by law for their services, concluded:

> Clearly, to my mind, the intent of Congress was that telegraph companies, operating under the act of July 24, 1866, should transact the business of the Government at rates fixed by the Postmaster General, and it is of minor importance as to who sends or receives the telegram. My opinion, therefore, is that the Departments, their officers

> and agents, may interchangeably telegraph each other, as hereinbefore stated, upon official business, subject only to the limitation that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures.

Both parties, therefore, thought that the test of the applicability of the statute was whether the cost of the messages in question was chargeable to the public treasury; the only difference between them was that the Attorney General held that the statute applied whether the charges were payable directly out of public moneys or were to be accounted for to the government by the officer making the payment, while the president of the respondent either did not realize that district attorneys and marshals were required to account for fees received by them or thought that the statute was applicable only where the charges were *directly* payable out of the public treasury.

It appears from the record (R. 18–19) that the respondent has "continuously from the date of its acceptance of the restrictions and obligations and of the rights, powers and privileges" of the Post Roads Act extended the government rates with the right of priority in transmission "to the telegraphic communications of" various branches of the government and governmental bureaus, commissions, boards, and other organizations. Obviously this means all telegraphic communications,

and there has been no attempt to distinguish between messages relating to strictly governmental activities and those relating to activities which are to some extent commercial in character.

Section 5266 and its acceptance by the respondent constitutes a contract. The practical construction thus placed for over fifty years upon this contract by the parties to it can hardly be now rejected. *Topliff* v. *Topliff*, 122 U. S. 121; cf. *United States* v. *Alabama Railroad Company*, 142 U. S. 615, 621; *Potter* v. *Hall*, 189 U. S. 292, 300.

There can be no question that the cost of the telegrams here involved is chargeable to the public treasury. We have endeavored to show above that they were sent by the Emergency Fleet Corporation in connection with its activities as agent of the United States under authority delegated to it by the Shipping Board pursuant to the Merchant Marine Act, 1920. Section 14 of that Act required that after July 1, 1921, the net proceeds derived from all activities of the Shipping Board, "less such an amount as may be authorized annually by Congress to be withheld as operating capital" and less such sums as might be needed for the insurance and construction loan funds authorized by the Act, should be covered into the Treasury of the United States as miscellaneous receipts. Congress during the period here in question annually appropriated to the Shipping Board for the expenses of the Emergency Fleet Corporation, including, among other things, carrying out the provisions of the

Merchant Marine Act, 1920, the amount on hand at the beginning of each fiscal year, and the amount received during that fiscal year from the operation of ships, and since such amounts were insufficient, also appropriated large additional sums from the Treasury of the United States.

It is evident, therefore, that neither the amount on hand at the beginning of a fiscal year nor the amount received during the fiscal year by the Emergency Fleet Corporation from the operation of ships as agent of the Shipping Board belonged to the Emergency Fleet Corporation in its corporate capacity; that all such amounts were the property of the United States and could be used by the Shipping Board through the Emergency Fleet Corporation only when and if appropriated by Congress; and that Congress made appropriations for the expenses of the Emergency Fleet Corporation in carrying out the provisions of the Merchant Marine Act, thus recognizing the responsibility of the United States, as principal, for the expenses of its agent.

Under these circumstances it can not be doubted that the cost of messages sent by the Emergency Fleet Corporation in connection with its activities as agent of the United States was chargeable to the public treasury. That the Emergency Fleet Corporation may have had corporate funds, resulting from the original payment of $50,000,000 for its capital stock, is entirely immaterial. It is apparent that the expenses of the Emergency Fleet Cor-

poration in its activities as agent of the United States were to be paid from Congressional appropriations and not from corporate funds, even if it had such funds.

III

SECTION 5266, R. S., SHOULD BE CONSTRUED AS APPLICABLE TO TELEGRAMS TO OR FROM OUTSIDE PARTIES, NOT CONNECTED WITH THE GOVERNMENT, IF THE COST THEREOF IS A CHARGE AGAINST THE PUBLIC TREASURY

Respondent has claimed that certain of the telegrams involved in this case were not "between the several Departments of the Government and their officers and agents" within the meaning of Section 5266, R. S., because they were sent to persons not connected with the government or the Emergency Fleet Corporation.

It must be admitted that if the statute were to be construed *de novo* this claim would have considerable force. But, as pointed out above, for over fifty years the parties have construed Section 5266, R. S., as being applicable to all messages the cost of which is chargeable to the public treasury and have acted on that construction. It is true there is some language in 14 Op. A. G. 278, which suggests a more restricted meaning for the phrase "between the several Departments of the Government and their officers and agents," but the question was not actually involved, and the suggestion evidently was never acted upon. There can be no doubt, also, that the government may be as much interested in the cost

of a message sent by one of its agents to a private individual as of a message sent by him to another agent of the government. The purpose of the statute, therefore, is equally applicable to both messages.

It is apparent from the debates in the Senate on the bill which finally became the Post Roads Act that it was the intention of Congress that the rate fixed by the Postmaster General should be applicable to all governmental messages and not only to those messages which were both sent and received by an officer or agent of the government. On June 29, 1866, Mr. Sherman, who was in charge of the bill in the Senate, said (72 Congressional Globe, Part 4, 39th Congress, 1st Session, page 3482):

> This bill provides that for all messages sent by the Government, or by any officer of the Government, or to any officer of the Government, the Postmaster General shall have the right to prescribe the rates.

And it appears (id. page 3489) that on June 29, 1866, an amendment to the bill was offered which would have made it the duty of the Postmaster General annually to advertise for proposals "for doing the telegraphic business of the several departments of the Government of the United States" and to award a contract to the lowest bidder, and Mr. Sherman said with respect to this proposed amendment:

> The provision of the bill is much simpler and much better that the price of all messages sent by or to any officer of the Govern-

ment shall be fixed by the Postmaster General. It is much better to leave it with him than to open it to contract or competition. I hope, therefore, that the amendment will not be agreed to.

* * * * *

I hope that amendment will not be adopted. It will only put the Government of the United States to expense. It seems to me not necessary. The bill is very carefully guarded. We have put the price of Government messages in the power of the Postmaster General, who will always, as a matter of course, endeavor to get the business done at the lowest possible price consistent with the public interest.

The question here under consideration is, of course, not restricted to messages of the Emergency Fleet Corporation. All governmental messages, of every branch of the government, are involved. We believe that in view of the purpose of Section 5266, R. S., to save money for the public treasury, and the construction applied by the parties for many years, the Court should not now interpret the Act to be inapplicable to messages sent by an agent of the government to an outsider. To make the test as to whether a message is within the Act whether its cost is chargeable to the public treasury is consistent with the purpose of the Act, easy and certain of application, and in accord with the practice adopted by the parties.

CONCLUSION

The judgment of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board Emergency Fleet Corporation.

RALPH H. HALLETT,
Assistant Counsel, United States Shipping Board Emergency Fleet Corporation.

GARDNER P. LLOYD,
Special Assistant to the Attorney General.

O. P. M. BROWN,
Special Counsel, United States Shipping Board.

NOVEMBER, 1927.

APPENDIX

The Merchant Marine Act, 1920

The pertinent sections of this Act (approved June 5, 1920, c. 250, 41 Stat. 988; U. S. C., Title 46, Secs. 861, 863, 864, 866, 871, 873, 886) are (italics ours):

> Sec. 1. That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.
>
> • • • • •

SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

SEC. 5. That in order to accomplish the declared purposes of this Act, and to carry out the policy declared in section 1 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes

to be attained by this Act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 6 of this Act, all of the vessels referred to in section 4 of this Act or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. All sales made under the authority of this Act shall be subject to the limitations and restrictions of section 9 of the "Shipping Act, 1916," as amended.

* * * * *

SEC. 7. That the board is authorized and directed to investigate and determine as promptly as possible after the enactment of this Act and from time to time thereafter what steamship lines should be established

and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in its judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coastwise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service. The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. The Postmaster General is authorized, notwithstanding the Act

entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, to contract for the carrying of the mails over such lines at such price as may be agreed upon by the board and the Postmaster General: *Provided*, That preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States who have the support, financial and otherwise, of the domestic communities primarily interested in such lines if the board is satisfied of the ability of such persons to maintain the service desired and proposed to be maintained, or to persons who are citizens of the United States who may then be maintaining a service from the port of the United States to or in the general direction of the world market port to which the board has determined that such service should be established: *Provided further*, That where steamship lines and regular service have been established and are being maintained by ships of the board at the time of the enactment of this Act, such lines and service shall be maintained by the board until, in the opinion of the board, the maintenance thereof is unbusinesslike and against the public interests: *And provided further*, That whenever the board shall determine, as provided in this Act, that trade conditions warrant the establishment of a service or additional service under Government administration where

a service is already being given by persons, citizens of the United States, the rates and charges for such Government service shall not be less than the cost thereof, including a proper interest and depreciation charge on the value of Government vessels and equipment employed therein.

* * * * *

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; *and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act,* the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

* * * * *

SEC. 14. *That the net proceeds derived by the Board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act,* except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof,

and for the construction loan fund authorized in section 11 hereof, *shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts.* The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

* * * * *

SEC. 35. *That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.*

APPROPRIATION ACTS

The Sundry Civil Act, approved June 5, 1920 (c. 235, 41 Stat. 874, 891), provided:

> The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the following sources: (a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed $15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed $25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed $30,000,000 from ships sold during the fiscal year 1921: * * *.

The Sundry Civil Act, approved March 4, 1921 (c. 161, 41 Stat. 1367, 1382), provided:

> The expenses of the United States Shipping Board Emergency Fleet Corporation during the fiscal year ending June 30, 1922, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, the completion of vessels now under construction, and for carrying out the provisions of the Act entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal

certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes," approved June 5, 1920, shall be paid from the following sources: (a) The amount on hand July 1, 1921; (b) the amount received during the fiscal year 1922 from the operation of ships, and (c) not to exceed $55,000,000 from deferred payments on ships sold prior to the approval of this Act, from plant and material sold during the fiscal year 1922, and from ships sold during the fiscal year 1922: * * *.

The Urgent Deficiencies Act, approved August 24, 1921 (c. 89, 42 Stat. 192), provided:

> For expenses of the United States Shipping Board Emergency Fleet Corporation for losses due to the maintenance and operation of ships and for administrative purposes, $48,500,000: * * *.

The Sundry Civil Act, approved June 12, 1922 (c. 218, 42 Stat. 635, 647), provided as follows:

> For expenses of the United States Shipping Board Emergency Fleet Corporation during the fiscal year ending June 30, 1923, for administrative purposes, miscellaneous adjustments, losses due to the maintenance and operation of ships, for the tie-up, reconditioning, and repair of ships, and for carrying out the provisions of the Merchant Marine Act, 1920, (a) the amount on hand July 1, 1922; (b) $50,000,000: *Provided*, That no part of this sum shall be used for the payment of claims other than those resulting

from the current maintenance and operation of vessels; (c) the amount received during the fiscal year 1923 for the operation of ships.

All of these appropriations were made under the heading "Shipping Board."

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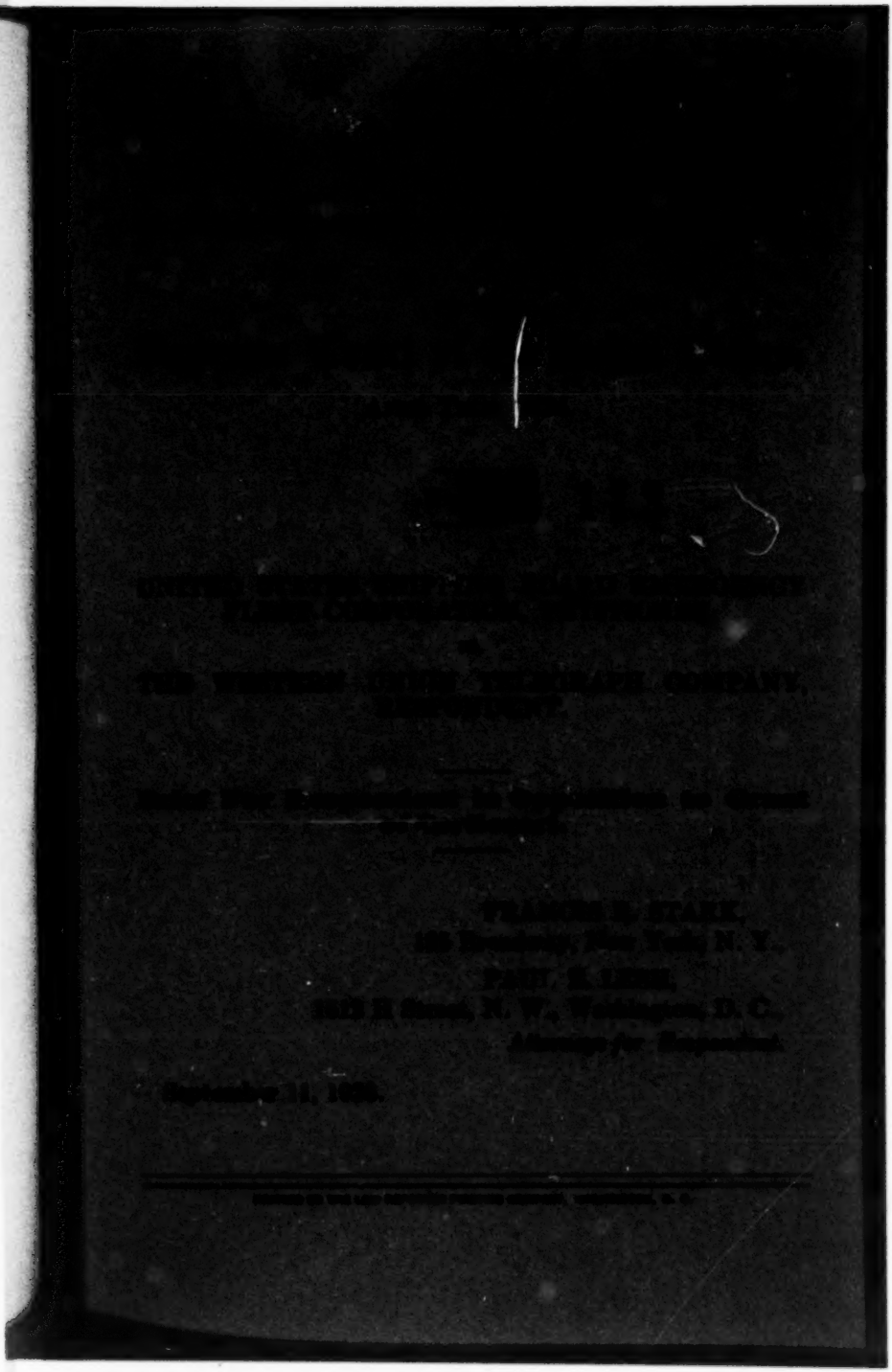

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IN THE

Supreme Court of the United States

APRIL TERM, 1926.

No. 604.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, RESPONDENT.

Brief for Respondent in Opposition to Grant of Certiorari.

It is not the purpose of this brief to present arguments, as such, upon the ultimate merits of this controversy. This brief is directed solely to the question whether the case presented by the petition and supporting brief is one in which this court should exercise its power to grant certiorari.

It is of first importance, therefore, to define what questions the petitioning corporation seeks to have determined by this court:

To illustrate: In the courts below it was contended that the ownership by the United States of the capital stock of the Fleet Corporation was relevant to the granting to it of the preferential rate to which only the Government is entitled. It was therefore with this question principally that the opinion of the court below is concerned. But this argument is not proposed to be brought before this court, and is disclaimed (petitioner's brief, p. 21).

The alleged errors which this court is asked to review are these (petitioner's brief, pp. 17 to 18):

(1) A failure to give weight to a practical construction of a contract as claimed to have been followed in a course of dealing for forty-nine years.

(2) A holding that messages "paid for from public funds" may be denied the priority and preferential rate appropriate to Government messages.

(3) A holding that the Fleet Corporation was not such an agent of the Shipping Board as to be the agent of a department of the Government within the meaning of R. S., Sec. 5266.

No one of these alleged errors appears to merit the grant of the writ within the principles declared in Rule 35, paragraph 5 (c), of this court; and for convenience we discuss the alleged errors in the order in which the petitioner states them.

The Argument Founded on Practical Construction.

This contention appears to be founded on the theory already adversely adjudicated by this court.

Since 1910 telegraphic rates have not been a matter of private contract, but a matter of law. Western Union Telegraph Company *vs.* Esteve Brothers and Company, 256 U. S., 566, 65 L. Ed., 1094.

The argument now advanced is that the petitioning corporation, engaged in commerce, is entitled to a rate preferential as compared with competing corporations, because a course of dealing has set up an implied contract to give that preferential rate. Even if the telegraph company had expressly so contracted, this court has already settled that—

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons . . . . since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all" (Western Union *vs.* Esteve Bros., supra).

The Fleet Corporation brings forward certain correspondence between the telegraph company and the Postmaster General, in 1873, (wherein the subject-matter was telegraphing by United States attorneys and marshals whose offices used for their expenses fees collected by them) as evidence of the practical construction placed on the Post Roads Act (approved July 24, 1866, 14 St. L., 291) by the telegraph company. Petitioner bases its argument apparently on the supposition that it is possible for the telegraph company to vary the law fixing its rates by its agreements or letters or practices. Let us suppose that the Postal Telegraph and Cable Company had taken a different position in similar correspondence. Are we to conclude that the Solicitor General on behalf of the Fleet Corporation would argue that the legal rate for the Western Union Telegraph Company was one thing, and for the Postal Telegraph Company, another?

We do not believe that this court need say again to settle the law that telegraphic rates are no longer matters of private agreement.

The trial court found on this point:

> "3. That the rates applicable to the telegraphic service rendered to the defendant by the plaintiff for which claim is made herein, are established and fixed by law, and no agreement, custom or course of dealing exists having the effect of varying the rates applicable to the messages of the defendant corporation." (Record, p. 56.)

The court of Appeals did not mention this argument in its opinion.

On this point, we submit that this case was properly determined, not upon consideration of any agreement or course of dealing between the Fleet Corporation and the telegraph company, nor upon any venerable letters passing between it and the Postmaster General, but strictly upon the legal merit of the claim of the appellant corporation to a preferential rate.

The Argument that Messages Were Paid for by Public Funds.

This test or formula advocated by petitioner by which to determine whether the Government rate is applicable had its origin in the correspondence between this particular telegraph company and the Postmaster General above referred to (petitioner's brief, p. 14; Record, p. 19, paragraph 19). It furnished a convenient rule of thumb for the determination of cases within the scope of what were the Governmental and quasi-Governmental activities of the 1870's, when the letter and opinion were written. The statute itself, however, the Post Roads Act, (supra, printed on p. 9 of petitioner's brief) contains no such formula. The source of the money for the payment of the telegraphic tolls is not mentioned in the statute.

But even if we assume that this definition of what is a Government message can be substituted for the definition contained in the statute, this case remains correctly decided.

The basis of fact assumed by petitioner's brief is lacking. Petitioner's statement of fact, fortified by no reference to the record, is

> "The Emergency Fleet Corporation had not, during the period here involved, any corporate funds; i. e., any funds belonging to it as a corporation. Payment for the telegrams is to be made out of funds belonging to the United States and appropriated by Acts of Congress." (Petitioner's brief, p. 17.)

The basis for this assertion, as we understand, is the fact that the operations of the Fleet Corporation have not produced sufficient revenues to meet its expenses, and therefore its stockholder, the United States, has met its deficit by appropriations of public funds. The fact that it has been necessary annually to supplement the corporation's revenues in order to cover a deficit does not, however, convert all of the funds of the Fleet Corporation into public funds. Nor does it necessarily follow that such deficits will arise or such appropriations be made in the future.

The petitioner correctly quotes the usual form of such

appropriations. Thus the expenses of the Fleet Corporation for the fiscal year 1921 were paid first from:

> "(a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships;" (41 St. L., 874, petitioner's brief, p. 13).

What can be meant by these phrases? "On hand" and "received" mean in the treasury of the Fleet Corporation, and received by the Fleet Corporation. These appropriations contemplate the use to exhaustion of the Fleet Corporation's revenues before the use of deficiency appropriations made to it.

It is true that the transfer of title of Fleet Corporation property from it has been assumed in decisions, as in the Sloan Shipyards case (258 U. S., 549, 568), but this was an assumption, not a finding or decision, and this court held that the assumed fact was immaterial.

The respondent does not concede, nor do the agreed facts show, that the Fleet Corporation is without property. Let it be assumed that the United States had the power by statute to take property from a corporation in which it is the sole stockholder (upon a theory perhaps of resulting trust), but it could justly take only what it had paid for, and the contention that it paid for all the property of the Fleet Corporation will not bear analysis. It should be remembered that the United States got $50,000,000 of corporate stock for the $50,000,000 with which it originally financed the Fleet Corporation. Such a transaction is not a gift. The Government received and still holds the consideration for its payment, the stock. The money became the property of the Fleet Corporation as against all persons including its stockholder.

The agreed statement of facts bearing on this point is as follows:

> "16. . . . All messages were sent out by the Fleet Corporation and paid for with funds derived by it as set forth in paragraph 14 hereof in connection with its operations as herein set forth." (Rec., p. 18.)
>
> "14. All property acquired by, or the legal title to

which became vested in, the Fleet Corporation has been exclusively the following:

"The Fifty Million Dollars ($50,000,000) appropriated and paid for its capital stock as aforesaid, the sums of money subsequently appropriated by Congress as appears from the several Acts appropriating the same, and property acquired by the expenditure thereof, and the proceeds of the sale and the revenues derived from the use of the property so acquired." (Rec., p. 16.)

It would appear to be too plain for argument that the money that came from the United States Treasury to buy stock, and was so used (and the stock still held), can not be said to have come from the Government treasury to pay telegraph tolls. It came from the corporate treasury to pay the tolls. Nor can money derived from operations based upon that capital be said to come from the treasury, or to belong, in any sense material to this suit, to the United States.

Nor did the Merchant Marine Act of June 5, 1920, purport to take from the Fleet Corporation all its property, as has been assumed. It provided only in those respects here material (Sec. 4) that all property "acquired by the President through any agencies whatsoever" pursuant to his repealed war powers, should be transferred to the Shipping Board.

There is in the citation in petitioner's brief (p. 17) to Section 14 of the Merchant Marine Act, a failure to distinguish between the Shipping Board, which for all purposes of this case may be treated as an administrative unit in the Executive Department of the Government, on the one hand, and the Fleet Corporation, on the other hand.

It is true as pointed out in petitioner's brief (p. 17) that by special statutes (40 St. L. 651; 42 St. L. 444), the Comptroller General was directed to audit the financial transactions of the Fleet Corporation. The fact that these special statutes were necessary in addition to Section 236, R. S., as amended, wherein that officer had been given authority over claims by and against the Government,

is but an additional evidence that the petitioning corporation is not a part of the Government. Petitioner's point, however, that it "is obligated to account to the United States" (p. 17) is not disputed. Nor is the fact that the petitioner is probably greatly in debt to the United States disputed. These facts, however, seem consistent only with out understanding of the situation, which is that the United States has advanced money to cover its deficits.

We are unable, however, to find anything excepting the bald assertion to support the conclusion that the funds which the Fleet Corporation pays for the transmission of its telegraphic messages are funds of the United States.

The Agency Argument.

Reduced to its simplest terms, this argument of the petitioner is that the Fleet Corporation is the Government.

The Post Roads Act provides for "telegrams between the several Departments of the Government *and their officers and agents*" (italics are from the petitioner's brief, p. 9).

Of course, neither the Government nor any Department can send a telegram or do any other act excepting by an officer or agent. Nor can the Fleet Corporation.

When, therefore, an individual on the pay roll of the Fleet Corporation sends a telegram on its behalf, the ultimate problem is whether that individual is an agent of the Government.

Petitioner argues that such a person sending a telegram is an agent of the Fleet Corporation, which is an agent of the Shipping Board, which is an agent of the Government, and that therefore such a person is an agent of the Government. In this aspect of the case, the question now to be determined is whether this court wishes an opportunity to reconsider its decision adverse to this contention made in United States *vs.* Strang (254 U. S., 491).

The status of the Fleet Corporation prior to the passage of the Merchant Marine Act of June 5, 1920 (41 St. L., 988), will not be directly before the court if this case is further considered. That Act repealed the material provisions of

the Act of June 15, 1917 (40 St. L., 182), and the Act of March 1, 1918 (40 St. L., 438), pursuant to which the Fleet Corporation had functioned in the war emergency under temporary war authorizations. Had it not been for those war activities of the Fleet Corporation, it probably would not occur to anyone that there was room to argue that it was entitled to preferential rate in sending its telegrams any more than any other corporation engaged in the business of commerce at sea. The respondent did not decline to send the petitioning corporation's telegrams at the Government rate until May 23, 1922, after the Fleet Corporation had passed through the war emergency period ending June 5, 1920, and a reconstruction period ending September 30, 1921, and its activities had been placed on a peace-time commercial basis (Rec., p. 14, paragraph 11; as to prior activities, see Rec., p. 8, et seq., paragraph 10).

This court has decided in cases which concerned the war period, as well as the subsequent periods in the existence of the Fleet Corporation, that it is not the Government (see The Lake Monroe, 250 U. S., 246; Sloans Shipyard Corporation vs. U. S. S. B. E. Fleet Corporation and other cases, 258 U. S., 549; United States vs. Walter, 263 U. S., 15; and U. S. S. B. E. Fleet Corporation vs. Sullivan, 261 U. S., 146).

To present now to this court a case in which the court is asked to hold that the Fleet Corporation is such an agent of the United States that its telegrams are the telegrams of the United States, is to ask this court to reconsider such prior decisions; because so to hold will be to hold that its agents in sending the telegrams were the agents of the United States.

The respondent has not contended that the Shipping Board is not a department of the Government within the meaning of the Post Roads Act. It has not contended that telegrams between officers and agents of the Shipping Board responsible to it for their conduct are not telegrams between departments of the Government within the meaning

of that Act, and the agreed statement of facts shows that the Government rate and priority of transmission is accorded to the Shipping Board (Rec., pp. 18 to 19). If therefore the commercial activities now carried on by the Fleet Corporation through officers and agents responsible to it were carried on by the Shipping Board, a different question, and one that is argued in petitioner's brief, would be presented.

But the case sought to be brought before this court does not present the broad and novel question which is argued in the petitioner's brief. That question is whether the Post Roads Act applies to messages of the Government having to do with proprietary or commercial business carried on by the Government as contrasted with its function of government. That question would be one not yet decided by this court and of great interest to the respondent. In such a case it could be properly contended by the petitioner that the respondent was attempting to read into the Post Roads Act an exception (petitioner's brief, pp. 23 to 24). Such an implied exception would certainly be a logical one.

There is a real distinction between government and business, even though the government may engage in business. Government has to do with the regulation and control of the conduct of people and with service to them. It is necessarily exclusive. There can not be competing governments, competing controls or public services as to the same subject matter in reference to the same people.

But business is not necessarily exclusive. It may be competitive. It has to do with the persuasion of people voluntarily to trade.

The lines of demarcation may be broad, so broad as to admit of a twilight zone, but cases may fairly be decided to fall into the one class or the other.

The Post Office Department partakes somewhat of the nature of business, but it is under our system monopolistic, and is removed from the field of business. No competitor post-office is prejudiced by the extension of government rates to that Department.

Generally speaking, the preferential government rate

ought not be extended to any business in which others than the government may engage, nor was it intended to be.

If a bureau of the Shipping Board, or of the War Department, engaged in the shipping business in competition with persons in that business, it is clear that it *ought not* to have the government rate, but there would be admittedly difficulties in the way of a technical contention to that effect, in view of the phraseology of the statute and the failure to separate that bureau by any plain line of demarcation from other parts of the government establishment.

That question, however, is not the one involved in the present case.

In this case the government itself through its legislative and executive branches recognized the inappropriateness of having competitive business engaged in by a governmental bureau, and has split that activity off from itself, by creating a stock company and buying the stock. All technical difficulties, which might arise with regard to the application of the Post Roads Act to the telegraphing incident to this commercial activity, disappear as soon as it is judicially established that such a stock company is an entity separate from the government itself.

The agent of a department within the contemplation of the Post Roads Act was necessarily an individual carried on the payroll of the department and subject to supervision as to the details of his official conduct by the department head, or by an immediate superior responsible to the department head. The agents of the corporation set up by the government to carry on the commercial activity are, on the contrary, responsible to that corporation and not to the government, though the government may through stock ownership control them indirectly.

And it should be remembered that the petitioning corporation will not if its petition be granted ask this court to give any weight to the fact that the corporation's stock is owned by the government. Petitioner must necessarily take the position that the case would be the same if the

government was a minority stockholder or owned no stock at all.

The argument of the petitioner must go to the length of saying that a corporation having a "cost-plus" contract with the government may telegraph at the government rate because in a sense it is an agent of the government and because in a sense what it spends comes out of the public treasury.

Indeed, the argument of the petitioner seems to go further and be founded upon the fact that in cases in which war activities of the Fleet Corporation were under consideration, this court has referred to the Fleet Corporation as an "agency" of the government. It would be as logical for the respondent corporation to contend that its acts are the acts of the government because it also has been called "a government agent" by this court (Western Union Telegraph Company *vs.* Texas, 105 U. S., 460).

No decision of this court, however, of which we have knowledge has cast any doubt upon the fact that it is the settled law of this court that the Congress and the Executive Department effectively accomplished their purpose of setting up an entity separate from the government when they created the Fleet Corporation.

None of the argument put forward by the petitioner to the effect that the commercial business of the Fleet Corporation is a proper governmental activity is relevant if it be kept in mind that the "Executive Department" here involved, the Shipping Board, has deliberately avoided engaging in this activity itself and has created the Fleet Corporation for the very purpose of separating that activity from itself, and that the Congress has so created that corporation that it may be entirely separated from the government by a sale to private individuals of all of its stock.

Since this separation of the Fleet Corporation's business from the other activities of the Shipping Board is an accomplished fact, it is perhaps not material whether it be by legislative or executive action. The fact is, however, that the Fleet Corporation is not a mere creature of the Shipping

Board, having only such powers as are delegated by the Shipping Board. Its own independent charter must be remembered. (Rec., p. 26.) And the Merchant Marine Act provided (Section 12) that it should—

> "continue in existence and have authority to operate vessels, unless otherwise directed by law."

It was this same statute that in Section 4 made the sweeping grant of authority to the Shipping Board, and in Section 35 authorized it to act through the Fleet Corporation. The latter section continued the qualification—

> "except as herein otherwise specifically provided."

The authority of the Fleet Corporation to operate the merchant fleet can not therefore be said to be derived by any grant from the Shipping Board, no matter what were the terms of resolutions of the Shipping Board (Petitioner's brief, p. 16).

It appears to respondent, therefore, that the question which would be for determination by this court if certiorari were granted is whether those cases in which this court has held the Fleet Corporation to be a separate entity were properly decided; and this question does not appear to respondent to be one (to quote the rule of this court first above cited) "which has not been, but should be, settled by this court."

The Stipulation for Final Determination by this Court.

As noted in the petition (p. 2), this stipulation was made October 19, 1922, before the 1925 amendment to the Judicial Code, and at a time when the questions involved in this case were such as to make this the court of last resort. The stipulation is printed in the Record, pages 24-25.

Doubtless the Solicitor General means to imply what we should plainly state, that is, that the intention was that the case should be expedited to final determination by whatever court should be the court of last resort. The intervening change in the law might have set up a different

court as the court of final jurisdiction, and the stipulation would have applied equally and required both parties to endeavor to have the case as speedily decided by that court as was possible. The gist of the stipulation was the expedition to a final determination, not the identity of the court having power to make that determination. By the intervening change in the law, the Court of Appeals has become the court of last resort, and the decision of that court will be final unless this court grants certiorari, the petition for which, it may be remarked while we are discussing the stipulation, was filed not with any particular expedition, but one day before the expiration of the time fixed by law.

The respondent is, of course, directly interested in the collection from the petitioner of the large sum of money involved, an estimate of which is quite fairly made in the petition (p. 5). The grant of the writ, if it has no other effect, will delay this collection for a considerable period and prolong the uncertainty now existing in the relations between the two corporations involved.

Aside from these considerations, however, the respondent considers it to be its right if not its duty to point out, as is above attempted, what questions are involved in the specification of alleged errors to be brought before this court, in aid of a determination by this court whether it should grant the writ.

Respectfully submitted,

FRANCIS R. STARK,
195 Broadway, New York, N. Y.,
PAUL E. LESH,
1512 H Street, N. W., Washington, D. C.,
Attorneys for Respondent.

September 11, 1926.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 113.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

JOHN W. DAVIS,
FRANCIS R. STARK,
PAUL E. LESH,
Attorneys for Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

The Issues.

The question involved arises upon the claim of the United States Shipping Board Emergency Fleet Corporation to the benefit of the preferential telegraphic rate and service provided for the "several Departments of the Government and their officers and agents" by the Post Roads Act approved July 24, 1866 (14 Stats., 221, Rev. Stat., Section 5266), now U. S. C. Title 47, Sec. 3, as follows:

> "Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix."

In the petitioner's brief the assumption is made that the Fleet Corporation sent and agreed to pay for these telegrams as the conventional agent of the United States

Shipping Board. In the opening paragraphs of its brief, in stating the question presented, the petitioner assumes that its contracts of employment of the telegraph company were made on its part as the delegate of the Shipping Board (Petitioner's brief, p. 2).

Also, it is stated in petitioner's brief, consistently with its assumption that the Fleet Corporation was but an agent, that the cost of these telegrams is "chargeable to the public treasury" (Petitioner's brief, p. 28). It is said that the moneys received by the Fleet Corporation from operations did not belong to the Fleet Corporation "in its corporate capacity" (Id., p. 29). Even the fact that $50,000,000 was received by the Fleet Corporation from the sale of its stock is, petitioner contends, immaterial on the question as to the creation of any corporate funds of the Fleet Corporation applicable to the payment of such debts as telegraphing (Id., pp. 29 to 30). The corporate entity of the Fleet Corporation, as a legal owner and disburser of funds, is as completely discarded in petitioner's argument as though it had not been created or capitalized.

Upon these two assumptions, both of which are stated as though they were agreed premises upon which the arguments of petitioner and respondent are to be based, is built the brief of petitioner, in the course of which the assumption of conventional agency and of Government payment of tolls is stated and reiterated as though beyond question.

The respondent contends that these two fundamental assumptions of the petitioner are unwarranted.

As respondent sees the case, the theory that the Fleet Corporation is but the delegate of the Shipping Board, not performing corporate acts (to use the petitioner's phrase), needs to be proven. So also must the theory that the Government's treasury, not the Fleet Corporation's, is the debtor. The question involved in this case can not be fairly or properly solved if a start is made by assuming these theories to be true.

The respondent's prima facie case is, of course, made

out by the admitted fact that it "transmitted and delivered" the messages "for and at the request of the Fleet Corporation," which "agreed to pay the plaintiff's legal and established charges therefor" (Declaration, Rec., p. 2; Plea, Rec., p. 46; Agreed Statement, Rec., p. 6).

The claim is reduced to the difference between the commercial and the Government rate by the admitted payment by the Fleet Corporation of the Government rate (Rec., p. 7), pursuant to the agreement which makes this case a test case for the determination of what rate is proper (Rec., p. 24).

The case then becomes one in which the burden of persuasion that the preferential Government rate is to be applied rests on the petitioner, and the case can be discussed most conveniently by first considering the petitioner's arguments. Though not all the facts which respondent considers material are summarized in the "statement" in petitioner's brief, the additional ones can be pointed out in the course of argument where their relevancy will better appear.

ARGUMENT.

I. Conformity by Fleet Corporation to Directions of Shipping Board Did Not Make Its Actions Delegated and Non-Corporate.

The petitioner is now apparently in agreement with the respondent in the view that the activities of the Fleet Corporation which are here involved are those subsequent to September 30, 1921. This date was used in the Agreed Statement of Facts as marking a convenient time from which to describe the peace-time activities of the Fleet Corporation, for the reason that the Shipping Board adopted a resolution dated that day providing for an allocation of activities between itself and the Fleet Corporation.

Respondent was at some pains in the courts below to point out that there are three well-marked periods in the activities of the Fleet Corporation: the war period, from July 11, 1917, to June 5, 1920 (Rec., p. 8, paragraph 10); the reconstruction period, from June 5, 1920, to September 30, 1921 (Rec., pp. 9 to 14); and the period when the messages involved in this suit were sent, that is, the period after the passage of the resolution of the Shipping Board of September 30, 1921, marking its return to a peace-time basis (Rec., p. 14, paragraph 11; Exhibit E 1, Rec., p. 30).

This seemed important for the reason that it was urged below by the petitioner that the conferring upon the Fleet Corporation of additional powers as an incident of the war so changed its original character that it was no longer a commercial corporation. Respondent urged below, and petitioner by its silence on the subject apparently concedes in this Court, that its activities since September 30, 1921, are those which control the character of the telegrams it now seeks to send at the Government rate, and are the only activities material in this suit.

The reasoning of the petitioner's brief is that, because the Fleet Corporation conformed in its activities during the period here in question to the directions given it by the Shipping Board, it was not acting in its corporate capacity. This fact of conformity to directions proves, the petitioner says, that its activities were delegated activities, performed as agent of the Shipping Board (Petitioner's brief, pp. 11 to 12, 17 to 18).

We respectfully submit that no such conclusion can be predicated upon the fact that the Fleet Corporation obeyed the direction of the owner of its entire capital stock. The very purpose of the creation of the Fleet Corporation must have been to have a corporation that would follow the directions of the Shipping Board. The statute pursuant to which the Shipping Board organized the Fleet Corporation directed it to subscribe for and always hold a majority of the stock, unless indeed it should sell it all (Shipping Act, 1916, approved September 7, 1916, 39 Stat., 728, Section

11). It was the original plan that all corporate acts of the Fleet Corporation should be under the control and subject to the direction of the United States, acting through the Shipping Board, so long as the United States held any stock therein.

The reasoning of the petitioner's brief would lead to the conclusion that the Fleet Corporation would act in its corporate capacity only when it disregarded the wishes of the Shipping Board, or when it engaged in some activity not authorized by that Board; in other words, that it could not act in its corporate capacity except when the corporate officers violated their official duties.

It was certainly the original plan that there should be a Government-controlled corporation, and that the Government's control should be exercised through Government ownership of stock. The Fleet Corporation can function only as a corporation, for that is what it is. When it functions in accordance with its stockholders' expressed desire, it is doing what most corporations do; certainly it is not the less functioning in its corporate capacity.

In attempting to maintain the position that when it conformed to the directions of the Shipping Board it was not acting as a corporate entity, it is said in petitioner's brief that the resolution of the Shipping Board of September 30, 1921, "contained no reference of any kind to any activities of the Fleet Corporation which it, as a corporate entity, was empowered to carry on as principal and not as mere agent of the Shipping Board" (Petitioner's brief, p. 11).

This statement appears to be inadvertent.

The certificate of incorporation of the Fleet Corporation states the object for which it was formed, as follows:

> "the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress,

> and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under Subchapter Four (4) of the incorporation laws of the District of Columbia" (Rec., p. 26).

The Merchant Marine Act of 1920, approved June 5, 1920 (41 Stat., 988), provided in Section 12:

> "And the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in Section 11 of the 'Shipping Act, 1916,' to the contrary notwithstanding."

The resolution of the Shipping Board of September 30, 1921, to which petitioner refers and which petitioner states contains no reference to activities which the Fleet Corporation might exercise as a corporate entity, contains an enumeration of the activities to be carried on by the Fleet Corporation, the first of which is:

> "(1) The operation, maintenance, repair and reconditioning of vessels, provided that no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board" (Rec., p. 31).

It is difficult to understand how petitioner came to state that no activities referred to in this resolution were activities which the Fleet Corporation might carry on in its corporate capacity.

All the activities described in this resolution are described in general terms. They are all lines of activity which are within a reasonable construction of the Fleet Corporation's charter. This, we say, happens to be the fact. If, however, it were otherwise, and the Shipping Board had directed the Fleet Corporation during this period to perform *ultra vires* acts, it would make no difference.

The Fleet Corporation in engaging in such activities would still be acting in the only capacity in which it could act, that is, as a corporate entity, and the over-stepping of its *vires*, if of interest to any one, would interest the Department of Justice alone.

Yet the petitioner, as we understand its brief, appears to base its case upon the fact that the activities of the Fleet Corporation being carried on at the time these messages were sent were of the kind and in conformity with the directions described and contained in the Shipping Board's resolution of September 30, 1921, and therefore, petitioner says, not "on its corporate account" (Petitioner's brief, p. 17).

On the contrary, it seems necessary only to quote a description of those activities as contained in the Agreed Statement of Facts to compel the conclusion that they were the very activities for and in which this separate entity was expressly created, capitalized and authorized by law to engage. The Agreed Statement on this point is as follows:

> "11. During the period when the messages involved in this suit were sent and at all times subsequent thereto the Fleet Corporation operations have been exclusively the following: The management, operation, maintenance, repair and reconditioning of vessels; the establishment and operation of lines and routes of vessels; the completion or conclusion of construction work upon vessels; the sale of vessels; the operation and sale of housing projects, real estate, railroad and other similar property; the operation and sale of dry docks; the custody and sale of other property and materials; matters of accounting; insurance and matters pertaining to the same; the operation of pier and pier facilities; the disbursement and expenditure of all moneys arising out of operations, and of funds allotted to it from appropriations by Congress; the leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and

for its terminal facilities; matters incidental to the foregoing, including the employment, compensation and removal of officers and employees" (Rec., p. 14).

II. The Relation of the United States to the Fleet Corporation Is Simply That of Controlling Stockholder.

There is no doubt that the Fleet Corporation is in a broad sense an operating agency or instrumentality of the Government. In the same broad sense, every corporation is an operating agency or instrumentality of its stockholders. Legally no relation of agency exists.

Even if the petitioner could establish (contrary to the fact, as respondent sees it), that the Fleet Corporation is a conventional agent of the United States or of the Shipping Board, so that it might be fairly said that the relation between the United States and the Fleet Corporation is that of principal and agent, it would not follow that the Fleet Corporation is such an agent as comes within the description of "their officers and agents" used in the Post Roads Act. Nevertheless, in order fully to present the issue involved in this case, it seems desirable to state the respondent's view as to the relationship between the United States and the Fleet Corporation at the times when these messages were sent.

When a corporation or person follows the directions of the Government or another in business matters and is furnished with funds by that other, it is often the fact that the directing Government or person is a principal and the acts of the directed party are those of an agent for the principal. The term agent or agency or instrumentality may be sufficiently accurate to describe the relationship between such parties for many purposes, but when as in the present case a legal conclusion is sought to be drawn from the alleged agency, it is not sufficient to define the relationship between the parties by any loose or general use of that term.

It is not accurate to say that the United States was

the principal and the Fleet Corporation was the agent in the transactions with which we are here concerned.

If this were true, the United States would be the obligated party upon contracts made by the Fleet Corporation, including the contracts for the sending of these messages.

Certainly this is not the view even of the petitioner, or else the petitioner would not have made the agreement of October 19, 1922, with the respondent wherein it was agreed that upon the final determination of this suit "the Fleet Corporation and the Telegraph Company will settle their accounts in accordance with the final determination of the suit aforesaid" (Rec., pp. 24 to 25).

The whole hypothesis of the present suit, both on the part of the respondent and the petitioner, is that the petitioner employed the respondent to transmit messages and that the only question involved is the determination of the appropriate rate, not whether the Fleet Corporation or the United States Government is the proper party defendant.

If the petitioner had been of the view that the United States is the party liable on the contract to pay for these messages, as would be the case if the corporation were an agent merely, then its main defense would undoubtedly have been that it is not liable at all either for the Government rate or the commercial, since when the principal is disclosed the liability on a contract is the principal's and not the agent's.

The object most usually sought to be attained by the formation of a corporation is the avoidance of personal responsibility, as principals, by the persons who form the corporation and control it. One of the principal benefits realized from the transaction of business through corporate forms is this very escape from the relation of agency between the ultimate owners of the business and the individuals who carry it on.

The history of the Fleet Corporation makes it plain that this usual and indeed inseparable incident of incorporation was expressly sought by the Government.

The Shipping Act of 1916 (39 Stat., 728) authorized the Shipping Board to form one or more corporations for

the purchase, etc., and operation of merchant vessels in the commerce of the United States.

The corporation was formed under Chapter XVIII, Subchapter Four of the Code of Law for the District of Columbia (31 Stat., 1189 et seq.). The certificate of incorporation complies with Section 606 of this statute, and its statement of purposes, as above quoted, appears to make the corporation for all time, or until the certificate shall be amended, a private corporation engaged in mercantile business.

Such a corporation has, under Section 607, the capacity of suing and being sued, that of having a common seal and altering the same at pleasure, and the capacity to purchase, hold or convey any real or personal estate necessary to carry on the operations named in its certificate.

Section 608 provides that such a corporation shall be managed by trustees who shall be stockholders and a majority citizens of the District of Columbia. The Board of Trustees of the Fleet Corporation as constituted by the certificate complied with these requirements, and it appears that the Fleet Corporation continues to be managed by its corporate trustees, whose subordination to the will of the United States as stockholder is admitted to be carefully preserved in the current resolutions of the Shipping Board (Rec., pp. 32, 34).

It is provided by Section 613 of the Code that no corporation under that subchapter could transact business until 10 per cent of the stock shall have been actually paid in.

By an amendment to the Code, Section 552, (the Act of February 4, 1905, 33 Stat., 689), it is provided that the Recorder of Deeds shall not record any certificate of incorporation until it has been proven to his satisfaction that all the capital stock has been subscribed for and not less than 10 per cent has been paid in cash, and that the money derived therefrom is then in the possession of the first board of trustees.

Complying with this statute, a stock subscription list showing that the Shipping Board, on behalf of the United

States, had subscribed for 499,993 shares and that seven individuals had subscribed for one share each was exhibited to the Recorder of Deeds at the time the original certificate was filed. There was also exhibited a certificate of the Secretary of the Treasury to the effect that there was $50,000,000 in the Treasury to the credit of the trustees of the corporation. (Rec., p. 15, paragraph 13.)

Section 614 of the Code provides that the stock shall be transferable, thus authorizing the sale of the stock of the United States contemplated by the Shipping Act of 1916, which had provided:

> "The Board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein."

Section 615 of the Code provides that all the stockholders shall be liable to the creditors of the company for the unpaid amount due on the shares of stock held by them until the whole amount of the capital stock shall be paid in and a certificate thereof made and recorded. Section 616 of the Code provides how such a certificate shall be framed and executed, the purpose of which is to make record evidence of the termination of the liability of stockholders, in this case the termination of the liability of the United States or its successors in interest as stockholders.

The Fleet Corporation considered it essential, and properly so, to avail itself of this provision of the statute, and on May 1, 1918, filed its certificate as to the full payment of stock in the office of the Recorder of Deeds (Rec., p. 15, paragraph 13; Rec., p. 37, Exhibit "H").

It is significant that this certificate, the purpose of which was to mark the termination of the liability of the United States for undertakings of the Fleet Corporation, was made and filed after the events beginning with the issue of the President's Executive Order bearing date July 11, 1917 (Rec., p. 8, paragraph 10; p. 14, paragraph 12), which are referred to when it is said that the Fleet Corporation was used as a war instrumentality by the President.

The corporate organization so set up has been carefully preserved throughout the life of the Fleet Corporation to the present day. Stock certificates were issued and the successors of the original trustees have been in each case qualified as stockholders in accordance with Section 608 of the Code (Rec., p. 15, paragraph 13).

It had been provided by Section 11 of the Shipping Act of 1916 that:

> "Five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved."

By the Merchant Marine Act of 1920, it was provided (Section 12, quoted *supra*, p. 6), that the Fleet Corporation should continue in existence and have authority to operate vessels.

No permanent statute has been passed changing the original character of the Fleet Corporation as a private corporation organized under the provision of law authorizing the incorporation of private corporations in the District of Columbia, nor changing its original character in any respect, unless the statute last quoted effects a narrowing of its corporate powers to the operation of vessels; and there is now an unquestionable concurrence of judicial decisions to the effect that it is such a private commercial corporation subject to all the usual responsibilities and liabilities of such a corporation.

It is a fact that the corporation so existing is subject to the direction of the United States, exercised under existing statutes through the Shipping Board. This subjection or subordination is, however, to be accounted for solely by the fact that the United States owns all of the corporate stock. The control of the United States is not that of a master over its servant, or a principal over its agent, nor of a State over its officer, but that of a stockholder over a corporation of which it has, by reason of its stock ownership, complete

control. No other legal relation exists to which to refer the availability of the Fleet Corporation for such use as the United States may see fit to make of it. The procedure of continuous control of the corporation is strikingly similar to that in the case of the Panama Railroad Company (see Panama Railroad Co. vs. Curran, infra, pp. 26).

The fact that such control is exercised to direct the Fleet Corporation to operate ships which may be owned by the United States, or to deal with dockyards and other properties of the United States, does not change the legal relation between the United States and its corporation.

The fact that it does not own all or some of the ships and dockyards which it uses does not derogate from the fact that in operating them the Fleet Corporation functions as a corporation, operates on its corporate account.

In this connection the petitioner's brief says:

> "Respondent's argument must go to the length of contending that a corporation can never act as an agent of the United States" (Brief, p. 19).

The respondent does not contend that the United States may not make contracts by means of the Fleet Corporation as an agent. Respondent contends that the Fleet Corporation is not such an "agent" as was contemplated by the Post Roads Act; but the respondent's point here is that the contracts to pay for these telegrams were not made by the United States through the Fleet Corporation, but by the Fleet Corporation; and the fact that the Fleet Corporation was, during the period in question, engaged in activities in which it had been directed by its stockholder to engage does not convert the contracts which it may make into contracts of its stockholder.

On this point the petitioner cites U. S. S. B. E. Fleet Corporation vs. Galveston Dry Dock Co. (13 Fed., [2d] 607). In that case, however, the contract by the Fleet Corporation contained the following provision:

> "Work to be . . . charged to the account of the United States Shipping Board, to be audited

> and checked by representatives of the comptrollers; statement covering the cost to be rendered to the Division of Construction and Repair at New Orleans, Louisiana."

Judge WALKER, writing the opinion, said:

> "Plaintiff's acceptance of orders containing that provision evidences its agreement to look to the Shipping Board for payment for the labor and material called for by those orders, and is inconsistent with the contracts sued on having the effect of obligating the Fleet Corporation to pay the amounts promised to be paid."

To demonstrate that this decision does not help the petitioner, one need only refer to a case decided a few months theretofore by the same Circuit Court of Appeals for the Fifth Circuit, U. S. S. B. E. Fleet Corporation *vs.* Texas Star Flour Mills (12 Fed. [2d], 9, 11), a suit to recover damage to flour shipped under contract with the Fleet Corporation, in which also Judge WALKER wrote the opinion and in which he said:

> "There is no merit in the contention that the liability asserted could not be enforced against the carrier because in the transaction in question it acted as agent of the United States. The record does not show that it acted as such agent in those transactions. Liability incurred by it as a carrier is subject to be enforced by suit against it. Sloan Shipyards *vs.* U. S. Fleet Corp., 42 S. Ct., 386, 258 U. S. 549, 66 L. Ed., 762."

So in the present case the petitioner seeks to show that the Fleet Corporation is but an agent, pointing out the fact of conformity with the directions of the Shipping Board, its stockholder, as though that fact marked the contracts with the telegraph company as having been made as agent for the Shipping Board. What the petitioner points out, does not, we submit, support a conclusion that the Shipping Board was the principal in the contracts made for the sending

of messages by the telegraph company for the Fleet Corporation.

Yet the petitioner concedes that the fact that the Emergency Fleet Corporation is in a broad sense an operating agency or instrumentality of the Government which owns all of its capital stock does not entitle it to the Government rate for its messages. And the petitioner further concedes that if the activities of the Fleet Corporation here involved were "on its corporate account," in which the United States is interested only as stockholder, the respondent should prevail in this litigation (Petitioner's brief, p. 17).

III. The Tolls Upon These Messages Are Not Charges Upon the Public Treasury But Upon the Fleet Corporation's Treasury.

In this connection, the petitioner relies upon the fact that Congress has made appropriations for the expenses of the Fleet Corporation, "thus recognizing," the petitioner says, "the responsibility of the United States, as principal, for the expenses of its agent" (Petitioner's brief, p. 29).

The financial operations of the Fleet Corporation have been recently under examination by this court, U. S. ex rel. Skinner and Eddy Corporation vs. McCarl (72 L. Ed. Advance Opinions, 13), decided October 10, 1927.

In that case it was held that the Comptroller General had no jurisdiction of a claim arising under a contract made with the Fleet Corporation "representing the United States," though the Comptroller General had jurisdiction under the Act of June 10, 1921, 42 Stats., 20, 23, 24, of all claims by or against the Government and all accounts in which the United States is concerned as a debtor or creditor. The Government contended that the claims arose as an incident to the war powers conferred on the President by certain statutes referred to in Section 2 (c) of the Merchant Marine Act of 1920, jurisdiction to settle controversies under which had been conferred on the Shipping Board. This Court held that even if the claims did not arise as an incident to contracts under powers delegated by the President, but as

incidents to the original corporate powers of the Fleet Corporation, yet the general practice of keeping such corporate financing and financial control separate from the general financing of the Government was in accordance with law:

> "For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board."

As to the funds out of which the telegraph company is to be paid, the following excerpts from the Agreed Statement of Facts seem material:

> "All messages were sent out by the Fleet Corporation and paid for with funds derived by it as set forth in paragraph 14 hereof in connection with its operations as herein set forth." (Rec., p. 18.)

The funds so referred to are thus described in paragraph 14:

> "The Fifty Million Dollars ($50,000,000) appropriated and paid for its capital stock as aforesaid, the sums of money subsequently appropriated by Congress as appears from the several Acts appropriating the same, and property acquired by the expenditure thereof, and the proceeds of the sale and the revenues derived from the use of the property so acquired." (Rec., p. 16.)

Among the activities of the Fleet Corporation during the period here in question were the operation of vessels and various kindred matters and—

> "the disbursement and expenditure of all moneys arising out of operations, and all funds allotted to it from appropriations by Congress" (R. p. 14).

It is therefore plain that the Fleet Corporation has a corporate treasury which is to be distinguished from the United

States Treasury, and that disbursements for telegraphing are made from the Fleet Corporation's treasury and operate to reduce its net revenue.

Petitioner relies on the provision in Section 14 of the Merchant Marine Act of 1920, to the effect that the "net proceeds" derived by the Shipping Board, after July 1, 1921, after certain deductions, shall be covered into the Treasury (Brief, pp. 12, 28). Not only does this provision relate by its terms to the Shipping Board, and only inferentially to the Fleet Corporation, but the significance of the word "net" will not escape the court. Deductions from the gross are contemplated. If the "net proceeds" be from operation of ships by the Fleet Corporation, the *gross* proceeds obviously must go into its corporate treasury, and then suffer diminution by the amount of such operating costs as telegraphing, before the *net* is ascertained.

If there were net proceeds from operation, they would be profit, and could ultimately go nowhere else than to the sole stockholder, if the owner of the corporation thought it wise to withdraw them from the corporate treasury. When all the stock is in a single owner it is immaterial whether he takes his profits in dividends or directly from the company's treasury, since there is no one else to object.

It can not be contended that any different legal principle is applicable by reason of the fact that the Fleet Corporation may be temporarily operating at an annual loss instead of at an annual profit. The fact that it is operating at a loss makes it desirable for its sole stockholder, the United States, to appropriate to cover that loss, otherwise the operation can not go on. If it were operating at a profit, there would be an annual surplus, distributable to its stockholder. In either event, the cost of telegraphing operates to decrease its profit or possibility of profit.

The argument of the petitioner, as we understand it, is that inasmuch as the profit would go to the United States and the loss is met by the United States, the cost of telegraphing is an indirect charge on the public treasury. Petitioner, however, considers the fact that the United States

has met the deficiencies in the treasury of the Fleet Corporation as demonstrating that the United States is a principal and the Fleet Corporation an agent, and as demonstrating that the Fleet Corporation has no funds "in its corporate capacity." The respondent, on the contrary, finds in the fact that the United States is the sole stockholder of the Fleet Corporation and that it is not ready to dispense with the Corporation's activities a complete explanation of the contributions by the United States toward these deficiencies.

It will be convenient to deal separately with the contention that even an indirect charge upon the public treasury justifies the Government rate, and that will be done hereinafter (*infra*, p. 20). This portion of the brief is concerned with the proposition that it is the Fleet Corporation's own treasury which is the debtor in respect of these messages.

Statements have been made in the course of opinions in cases concerning the Fleet Corporation to the effect that it has no property. Thus in the Sloan Shipyards case (258 U. S., 549, 568), Justice HOLMES said:

> "The transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, chap. 250, Section 4, 41 Stat. at L., 988, 990, may affect the value of the remedy afforded by the present suit, but not the jurisdiction of the court."

Chief Justice TAFT, dissenting in the same case, said (p. 573):

> "Congress has taken over all the assets of the Fleet Corporation, so that such judgments will be valueless except as Congress shall conclude to pay them."

In the recent Skinner and Eddy case, supra, Justice BRANDEIS said:

> "In 1923, the Fleet Corporation assigned to the United States all of its assets, including accounts against divers persons for the payment of money."

The Merchant Marine Act of 1920, did not, however, purport to take from the Fleet Corporation all its property,

as has been assumed. It provided only (Section 4) that all property "acquired by the President through any agencies whatsoever" pursuant to his repealed war powers, should be transferred to the Shipping Board.

Whatever had been bought with the $50,000,000 capital of the Fleet Corporation, or bought with the proceeds of the sale of the first purchase, was certainly, as between the Fleet Corporation and its subscribing stockholder, the United States, the corporate property of the Fleet Corporation. Such property had not been "acquired by the President."

The annual appropriation acts subsequent to the enactment of the Merchant Marine Act purport to deal with the money in the treasury of the Fleet Corporation, but invariably the money in the treasury and the proceeds of operation of ships are either appropriated to the Fleet Corporation's purposes or recognized as belonging to it. Thus in the Sundry Civil Act, approved June 5, 1920 (C., 235, 41 Stats., 874, 891, Petitioner's brief, p. 41), it is provided that the expenses of the Fleet Corporation—

> "shall be paid from the following sources: (a) the amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships;"

The Sundry Civil Act approved March 4, 1921 (C. 161, 41 Stats., 1367, 1382), was in the same form.

The Sundry Civil Act approved June 12, 1922 (C. 218, 42 Stats., 635, 647), used the same phrases, but was in form an appropriation of these amounts.

Whether, however, the expressions in these appropriation acts are those of appropriation, as though the money were in the United States Treasury, or words indicating a recognition that such moneys are already in the treasury of the Fleet Corporation, the uniform effect of these acts was not to disturb the Fleet Corporation's possession of such amounts as it had on hand, and not to disturb its possession of the proceeds of the operation of ships, and no conclusion

of expropriation of the Fleet Corporation's funds may therefore properly be drawn from them.

The Merchant Marine Act and these appropriation acts contain the only references known to us from which an inference is sought to be drawn that the Government has taken over the property of the Fleet Corporation. When the present record was made up, it was considered material by the Fleet Corporation to put in it all the facts bearing upon this contention. It is noteworthy that the statement of fact most nearly supporting the view that the Fleet Corporation is without funds or property, in the present record, is that—

> "The Fleet Corporation has always considered that its holdings of such property and its functioning were always on behalf of the United States, and that no private purpose was to be served by it thereby." (Rec., p. 16.)

This statement amounts to no more than an appropriate declaration by the corporation that it was created to serve its stockholders, since there has been no change as yet in the stock ownership.

We are unable, therefore, to assent to the proposition that the Fleet Corporation is without property; but even if it were that would not affect its liability on its contracts.

IV. The Alleged Rule of Practice to the Effect that Tolls Depleting the Public Treasury Should Be Calculated at Government Rate Is Not Applicable to Fleet Corporation Messages.

As stated before, we regard it as conceded in the present case that the remedy of the telegraph company is not against the Government but against the Fleet Corporation. We are not confronted here with a contract of hiring of the telegraph company wherein the Fleet Corporation has undertaken to pledge the credit of the Shipping Board or of the United States. It is agreed that it is the Fleet Corporation which owes the tolls at whatever rate is legally applicable.

We have pointed out that the legal relationship between the Fleet Corporation and the Government is that of corporation and stockholder.

The conclusion seems inevitable that unless the Government chooses to make good the losses of the Fleet Corporation because of its interest in assuring its continued operation, the Government has no legal relation to these telegraphic tolls by means of which it can be compelled to pay them.

Yet the petitioner claims that by reason of a practical construction placed upon the Post Roads Act by the United States and the respondent for many years, it is immaterial whether the tolls are a direct charge on the public treasury or an indirect charge. If the United States is ultimately poorer by the amount of the tolls petitioner says, the preferential Government rate must be given. This argument is built upon correspondence between the Postmaster General and a former president of the Western Union Telegraph Company had in 1873, and in an opinion of the Attorney General rendered under date of July 10, 1873 (14 Op. A. G., 278) (Petitioner's brief, pp. 25 to 29).

The subject-matter of that correspondence and the opinion of the Attorney General was certain telegraphing done by United States marshals and United States attorneys who paid for the telegrams out of official fees and accounted to the Government for the net balance.

There is such a difference between the relationship between the Government and a corporation with which its legal connection is that of stock ownership on the one hand, and the relationship between the Government and a United States marshal or a United States attorney on the other hand, as to make the considerations applicable to the one case wholly inapplicable to the other. There is no doubt that a United States marshal or a United States attorney is an officer or agent of the Department of Justice, a person on the civil payroll, whether paid on the fee system or by a monthly salary. It can not be supposed for a moment that the parties to that correspondence and that ruling

attempted to lay down a rule of decision which would be appropriate to dispose of the present issues.

As a matter of fact, while the respondent has no record of the correspondence in question and at this time knows nothing of the circumstances except what appears from the printed opinion of the Attorney General, it seems evident from the letter of the former president of the telegraph company to the Attorney General that it was his understanding, however mistaken, that the "official fees or commissions" to which he referred were the property of the individual district attorney or marshal and not of the Government; and that all he was trying to do at that time was to safeguard the company against having to accept the Government rate for messages by which the treasury was not affected either directly or indirectly, but which were paid for (as he supposed) by Government agents out of their official compensation for services. However this may be, the principle was plainly recognized by both parties to this ancient correspondence that the Government rate did not apply except where the message was to be paid for "out of the treasury," as stated by the company's president, or "out of public moneys" as stated by the Attorney General—in either event money the title to which was in the United States, and which was "to be accounted for to the Government by the officer making the expenditures" (petitioner's brief, page 27). The title to the funds of the Fleet Corporation is not in the United States, nor are its expenditures subject to review by the Government accounting office.

If it were true that the ultimate effect on the Federal Treasury is the universal test as to whether messages are to be accorded the Government rate, then every corporation in which the Government owns stock would be entitled to the benefit of the Government rate in telegraphing. In the case of all such corporations, the Government would get a greater profit or suffer less loss if the telegrams of the corporation could be sent at lower rates.

The petitioner's line of reasoning would compel the Government rate to be extended to the Philippine National

Bank, the Panama Railroad Company, the Inland Waterway Corporation, the Federal Intermediate Credit Banks, the War Finance Corporation, the United States Housing Corporation, the United States Spruce Corporation, the United States Grain Corporation, the Federal Land Banks, and others.

It is noteworthy that in the enumeration of the various Bureaus and bodies, other than formal Departments of the Government, which the telegraph company has allowed to telegraph at the Government rate, contained in the Agreed Statement of Facts (Rec., p. 19), and repeated in petitioner's brief (p. 7), these corporations are conspicuously absent, with the single exception of the War Finance Corporation.

Yet the petitioner boldly states in its brief that the rule or test laid down in the correspondence of 1873 constitutes a practical construction of "over fifty years" standing which must be rejected in order not to be applied to the present case (Petitioner's brief, pp. 25, 28).

As to the Philippine National Bank, there has been an express adjudication that it is not entitled to the Government rate because not such an agent of the Government as is contemplated by the Post Roads Act. The case involving this bank is the only prior case in the courts involving the construction of this part of the Post Roads Act. It is Commercial Pacific Cable Co. *vs.* Philippine National Bank (263 Fed., 218) decided January 26, 1920, Southern District of New York. Judge MAYER stated the contention of the Philippine National Bank as follows:

> "That is is a department of the government of the United States, and that its officers and agents are officers and agents of the government of the United States, within the meaning of the Post Road Act of Congress of July 24, 1866 (Comp. St. Secs. 10072-10077), and that telegrams sent by defendant and its officers and agents are messages of the government of the United States or the officers and agents thereof within the meaning of said act, and hence that defendant was and is entitled to send the same through

the Bureau of Insular Affairs of the United States government as an intermediary at the government half rates and with precedence as to transmission."

In disposing of this issue he said, in part:

"The act creating the defendant bank provided that the government of the Philippine Islands should subscribe at the outset for 101,000 shares out of a total authorized issue of 200,000, and that as part payment for these shares it should transfer to the bank all the assets of the Government Agricultural Bank, which was owned absolutely by the government of the Philippine Islands; the government of the Philippine Islands is required at all times to own at least 51 per cent of the stock of the bank; and at the present time it owns approximately 85 per cent of the outstanding stock. The voting power of this stock is vested exclusively in a committee, consisting of the Governor General, an official appointed by the President of the United States, the President of the Philippine Senate, and the Speaker of the Philippine House.

"The affairs and business of the bank are managed by a board of directors consisting of the president, the vice-president, and five elective members. The president and the vice-president are appointed by the Governor General, with the advice and consent of the Philippine Senate, and the remaining five directors are elected in accordance with the General Corporation Law. The approval of the Governor General and the presiding officers of the two houses of the Philippine Legislature is necessary for various corporate acts on the part of the bank.

"The Attorney General of the Philippine Islands is the attorney for the bank, and the insular auditor, a person appointed by the President of the United States, is ex-officio auditor of the bank. Power is given to the Governor General, with the advice and consent of the Philippine Senate, to remove various officers of the bank. In respect of the bank as a governmental agency, designed to build up the wealth of the Islands, the following clauses are found in the charter:

"Fifty per cent of its capital and surplus may

be loaned on notes secured by mortgages on real estate. This, it is true, is an unusual provision; the national banks in the United States being prohibited from making loans secured by mortgages on real estate.

"It is given the exclusive use of the word 'National' with respect to banking business. . . .

"When authorized by the Governor General and the presiding officers of the two houses of the Philippine Legislature, it is authorized to guarantee both as to principal and interest, or either, bonds issued by incorporated companies for the erection of and additions to industrial plants or manufacturies principally used for the manufacture and preparation of the products of the Philippine Islands, and subject to the same approval the bank is authorized to purchase bonds issued by any duly incorporated company engaged in the manufature or preparation of products of the Philippine Islands.

"In view of the foregoing and other provisions, it is argued that the interest of the United States is so inextricably mingled with the purposes and administration of the bank and the welfare of the Islands and their government that the bank in effect is a department or agent of the government of the United States. But, although in the complex problems attendant upon the administration of the Philippine government, in the interest of its welfare and that of the United States, the bank has, of course, many close relations with the United States government, nevertheless there may be private ownership to the extent of 49 per cent of the stock of the bank, and it is permitted to do and does do a commercial business for profit, like any other bank. A financial institution so constituted can not be a 'department' of the United States government, or an 'agent,' in the sense of section 5266 of the Post Road Act, supra."

In disposing of the case Judge MAYER quoted from and relied upon the case of Bank of the United States *vs.* Planters' Bank of Georgia (9 Wheat., 904) as does, in fact, almost every opinion bearing upon this question. In passing, we note that when the Sloan Shipyards case was before the District Court (268 Fed., 624, 627) the District Judge based

his opinion (which was reversed by this Court, 258 U. S., 549) in part upon the proposition that the case of Bank of the United States *vs.* Planters' Bank was to be distinguished from a case involving the Emergency Fleet Corporation.

The status of the Panama Railroad Company has been adjudicated in Panama Railroad Co. *vs.* Curran (256 Fed., 768, decided March 24, 1919) by the Circuit Court of Appeals, Fifth Circuit, an action for damages against the Panama Railroad Company. The Court said:

> "The defendant is a New York corporation. All its capital stock is owned by the United States. Thirteen of the shares stand in the names of the directors of the company. Each of the directors for the time being gives to the Secretary of War an irrevocable power of attorney to transfer the stock standing in his name at any time. This enables that official, when the holder of a share ceases to be a director, to transfer it to the succeeding director. In the manner indicated the government absolutely controls the operations of the company. An intention to preserve the existence of the defendant as a private corporation has been clearly manifested in acts of Congress, some only of which need be mentioned. Act, June 25, 1910, c. 384, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1911 (36 Stat., 771), contains an item of $2,000,000 'for the payment of the cost of relocating the Panama Railroad, including salaries, wages, material, and supplies, and all other expenses incident thereto.' That act contained the following provision:
>
> " 'The foregoing appropriations shall be available to reimburse the Panama Railroad Company for marine losses, and for losses due to destruction of or damage to its plant, equipment, or commissary supplies by fire: Provided, that the Panama Railroad Company shall carry no insurance against loss from causes covered by this appropriation: Provided, further, that hereafter payment by the Panama Railroad Company to the United States, in accordance with the treaty with Panama, of the annual subsidy of two hundred and fifty thousand dollars, as pro-

vided by the concession granted by the United States of Columbia, shall not be required.'

"Section 6 of the Panama Canal Act of August 24, 1912 (37 Stat., 560 [Comp. St. Sec., 10042]), contains the following:

" 'The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall annually be covered into the treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress.'

"Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of Bank of the United States *vs.* Planters' Bank, 9 Wheat.,

904, 6 L. Ed., 244, are applicable to the facts of the instant case . . .

"From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. Pullman Palace Car Co. *vs.* Missouri Pacific R. Co., 115 U. S., 587, 6 Sup. Ct., 194, 29 L. Ed., 499; Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, 23 Sup. Ct., 728, 47 L. Ed., 1113; Salas *vs.* United States, 234 Fed., 842, 148 C. C. A., 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it."

If the petitioner's proposed test, that of direct or indirect charge upon the public treasury, were to be accepted, there would appear to be no limit to the list of corporations claiming the benefit of the preferential Government rate. Cost-plus contractors with the Government would then appear to be clearly entitled to it. Such corporations as the "Realty Companies, the capital stock of which is owned by the Fleet Corporation," referred to in the Agreed Statement of Facts (Rec., p. 12), would then likewise be entitled to the Government rate. Nor would there be reason for excluding the operating private steamship companies with which, as a matter of common knowledge, the Fleet Corporation contracts in allocating its vessels for passenger and freight service. To lessen the cost of doing business to any of these corporations is to lessen the ultimate charges against the public treasury.

When one considers the multitude of corporations and persons who may have such contracts with the Government that the extension to them of the Government rate for telegraphing would operate indirectly to the advantage of the Treasury, it becomes apparent that the rule of thumb suggested in the correspondence of 1873 with the Postmaster General can not be of universal application.

No such test is laid down in the statute itself upon which arises the question who are the "officers and agents" contemplated by it.

Without attempting to formulate a test of universal application, it may safely be stated that the officer or agent contemplated is first of all an individual, and secondly, an individual whose relationship to the Government Department is that of normal employment, as one on the military, naval or civil list. Corporations or even natural persons whose relationship to the Government depends upon contracts of other kinds, who are independent contractors, or separate legal entities controlled by stock ownership, and who do not telegraph on the Government credit but on their own, are not, it is submitted, the "officers and agents" contemplated by the Post Roads Act.

V. The Contract Between Respondent and the United States Effected by Respondent's Acceptance of the Post Roads Act Never Contemplated the Extension of Government Rates to Messages Sent by Such a Body As the Petitioner, or indeed to Any Messages Sent in Connection With Commercial Business Activities Carried on by the Government in Competition With Private Business.

The Fleet Corporation was engaged during the periods here in question as a carrier corporation, operating merchant ships in the commerce of the United States (Rec., p. 14).

The petitioner contends that no distinction is to be drawn between this activity and Government. Petitioner points out that the operation of merchant ships is an appropriate governmental function (brief, pp. 22 to 23), and cites Berizzi Brothers Company *vs.* S. S. Pesaro (271 U. S., 562), a case involving a merchant ship owned, possessed and operated for trade purposes by the Italian Government (Id., p. 24).

Granting that the United States Government might legally, if it had so elected, have engaged in the merchant shipping business, competing with private individuals in similar enterprises, this does not establish that the acceptance by the respondent of the benefits of the Post Roads Act would bind it to send the messages of the Government about this commercial business at the preferential Government rate.

The statute here in question is not merely a statute;

it is also an offer to contract, an offer which the Western Union accepted. It is well settled that the words of a contract are to be given the meaning which they would naturally and reasonably have had for parties of the sort concerned at the time and place and under the circumstances in which they were used.

Bell vs. *Bruen*, 1 How., 169, 187.
Chicago, Rock Island & Pacific Railway Company vs. *Denver & Rio Grande Railroad*, 146 U. S., 596, 609.
Merrian vs. *U. S.*, 107 U. S., 437, 441.
Barreda vs. *Silsbee*, 21 How., 146, 161.
Nash vs. *Towne*, 5 Wall., 689, 699.
Scott vs. *U. S.*, 12 Wall., 443, 444.
U. S. vs. *Gibbons*, 109 U. S., 200, 203.

In the *Nash* case, supra, this Court said:

> "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. . . ."

In the *Scott* case the following language occurs:

> "In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective."

The rule is the same where the contract is with a state and is embodied in an act of a state legislature.

In *Tennessee* vs. *Whitworth*, 117 U. S., 129, at page 137, this Court said:

> "This brings us to an examination of the present charter to see what the legislature has expressed its intention of doing. 'The capital stock of said company' is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, who are the owners of the capital stock of this corporation within the meaning of the term 'capital stock' as used in this charter, because, in construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. *In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have.*"
>
> 2 Williston on Contracts, Section 607.

And the same rule of construction was enunciated as applicable to Acts of Congress in *U. S.* vs. *Union Pacific Railroad Co.*, 91 U. S., 72. It is as true in this case as it was there that the statute "cannot be properly construed without reference to the circumstances which existed when it passed" (p. 79) and that "Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events" (p. 81).

As a matter of fact, it is a rule in the construction of statutes generally that the words of a statute are to be construed in reference to the circumstances surrounding its enactment and the history preceding that enactment.

Siemen's Administrator, vs. *Sellers*, 123 U. S., 276, 285.

Preston vs. *Brauder*, 1 Wheaton, 115, 121.

Aldridge vs. *Williams*, 3 How., 1, 241.

Smith vs. *Townsend*, 148 U. S., 490, 494.

Platt vs. *Union Pacific Railroad Company*, 98 U. S., 48, 64.

Holy Trinity Church vs. *U. S.*, 143 U. S., 457, 463.

The petitioner contends that the statute must be con
strued to apply not only to departments, bureaus, com
missions and the like governmental bodies in existenc
when the Act was passed, but also to those that may hav
come into existence since the Act was passed or that ma
come into existence in the future. The petitioner cite
the following cases in support of this contention:

Krichman vs. *U. S.*, 256 U. S., 363, 366.
Osborne vs. *City of Detroit*, 32 Fed., 36, 41.
White vs. *U. S.*, 191 U. S., 545, 552.
Shreveport vs. *Cole*, 129 U. S., 36, 47.
Fullerton, etc., Lumber Co. vs. *Northern Pacifi*
Ry. Co., 266 U. S., 435, 437.

In *Shreveport* vs. *Cole* it was alleged that a provision o
the Louisiana constitution impaired an antecedent contract
This Court said, in the course of its opinion denying Federa
Jurisdiction, that the Louisiana Supreme Court, in holdin
that the provision had prospective operation only, ha
followed the usual rule that constitutions and statute
are to be construed to operate prospectively only, unless
retrospective operation can not be avoided under the word
of the statute. Obviously, this statement of the Cour
has no application to the present case. There is in th
present case no question between retrospective and prospec
tive operation of the Post Roads Act. For the same reason
the White, Osborne and Fullerton cases are not in point
since the holdings therein are identical with those in th
Shreveport case.

Krichman vs. *U. S.* is more like the present case. Th
defendant therein was indicted and convicted for offering
a bribe to a person "acting for or on behalf of the United
States in an official function," the person being a baggag
porter of the Pennsylvania Railroad, the road being a
the time under Federal Control. The Court held that th
porter was not within the words of the Act.

> "The statute creating the offense was passed long
> before there was any thought of the Government

> taking over the railroads. That does not prevent its application if the thing done offends against it. It is, however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress."

It seems that if this case is pertinent at all to the present case, it is in respondent's favor. As in the Krichman case, the statute in the present case was passed along before there was any thought of the government engaging in the shipping business; and as in the Krichman case so in the present case that fact is pertinent for consideration in determining the scope of the duty of the Western Union under the Post Roads Act.

Applying the above rule of construction to the present statute or present contract, it seems clear that the duty of the Western Union should not be enlarged beyond that which it reasonably understood it was assuming when the statutory offer of the government was accepted. This does not mean that the benefits of the Act should not extend to new departments, bureaus and commissions and so on, or to *any* extension of governmental activity; but it seems to us that it should mean that the extensions of the activities of the United States government to fields not strictly governmental in character should not be held entitled to benefit from the statute, unless, as a matter of history, the government was engaged in such activity at the time of the acceptance of the Act by the Western Union. Such a construction, based on the historical situation when the Act was accepted, would take in such activities of the United States as the Post Office, which clearly is entitled to the benefit of the Post Roads Act, although it is a business, monopolized by the government.

A construction of this sort dividing off those activities of the government entitled to benefit from the Act from those not so entitled will be partly historical, and partly rational, but it will be in strict accord with the law of contracts. It will be fair to the respondent as imposing only the burden it reasonably contemplated in accepting the

offer; for it was certainly true in 1866 that the government was not engaged in business—except in the Post Office business, which stood on special historical and constitutional grounds—and it was not contemplated that the government would extend its activities into the business field. The construction will be fair to the government, as it will give the reduced rate and preferential service for all strictly governmental activity, and also for all activities not strictly governmental in character in which the government was engaged at the time the contract was made. It will likewise be fair to third persons, since it will avoid giving to the government in business special advantages not enjoyed by such third persons.

The contractual nature of the Post Roads Act is most important. It is ignored in the petitioner's brief. Unless it is kept in mind, there seems to be a difficulty, which petitioner's brief relies upon, in drawing a line between governmental and business activities of the United States government, whilst conceding to the Post Office Department, clearly a business, the benefit of the Act. It seems to the respondent that the contractual nature of the Post Roads Act should dominate the whole construction of the Act, which is the controlling question in this case. The arguments advanced by the petitioner in its brief, ignoring the contractual nature of the Post Roads Act, have been first dealt with in this brief, not because of their controlling importance but in order first to meet directly what the petitioner appears to rely upon.

VI. The Fleet Corporation Was Created to Separate Its Activities, Which Are Commercial, From Activities Governmental.

Again granting as above that the United States government might legally, if it had so elected, have engaged in the merchant shipping business, competing with private individuals and similar enterprises, another answer is that it chose not to do so.

The United States was willing to hold stock in a corporation

engaged in such activity, but not willing to engage in it in its own right. The Government itself created the Fleet Corporation for the very purpose of separating that commercial activity from the business of government.

Had this not been so, the respondent's argument here would be that the contract created by its acceptance of the Post Roads Act should not be so construed as to enable government-operated ship lines to enjoy telegraphic rates lower than competing lines privately owned.

There is a real distinction between government and business, even though the government may engage in business. Government has to do with the regulation and control of the conduct of people and with service to them. It is necessarily exclusive. There can not be competing governments, competing controls or public services as to the same subject-matter in reference to the same people.

But business is not necessarily exclusive. It may be competitive. It has to do with the persuasion of people voluntarily to trade.

The lines of demarcation may be broad, so broad as to admit of a twilight zone, but some cases will clearly fall in the sunny belt this side of the twilight and some as unmistakably in the dark belt beyond.

The operations of the Post Office Department partake somewhat of the nature of business, but it is under our system monopolistic, and thus removed from the ordinary business field. No competitor post-office is prejudiced by the extension of government rates to that Department.

Generally speaking, the preferential government rate ought not be extended to any business in which others than the government may engage, nor was it intended to be.

If a bureau of the Shipping Board, or of the War Department, should engage in the shipping business in competition with private persons in that business, it is clear that it *ought* not to have the government rate, although practical difficulties might arise in determining whether a given message was governmental business or commercial business, if the bureau were not separated in its functions by any plain line of

demarcation from other parts of the governmental establishment.

In this case the government itself through its legislative and executive branches has recognized the inappropriateness of having competitive business engaged in by a governmental bureau, and has split that activity off from itself by creating a stock company and buying the stock. All practical difficulties which might arise in segregating from the application of the Post Roads Act the telegraphing incident to this commercial activity, disappear as soon as it is judicially established that such a stock company is an entity separate from the government itself.

The agent of a department within the contemplation of the Post Roads Act was necessarily an individual carried on the payroll of the department and subject to supervision as to the details of his official conduct by the department head, or by an immediate superior responsible to the department head. The agents of the corporation set up by the government to carry on the commercial activity are, on the contrary, responsible to that corporation and not to the government, though the government may through stock ownership control them indirectly.

Since this separation of the Fleet Corporation's business from the other activities of the Shipping Board is an accomplished fact, it is perhaps not material whether it was done by legislative or executive action. The fact is, however, that the Fleet Corporation is not a mere creature of the Shipping Board, having only such powers as are delegated by the Shipping Board. Its own independent charter must be remembered (Rec., p. 26). And the Merchant Marine Act provided (Section 12) that it should

> "continue in existence and have authority to operate vessels, unless otherwise directed by law."

This same statute provided:

> "SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation."

Pursuant to this section, however, no strictly governmental power or authority was attempted to be vested in the Fleet Corporation at any time material in this suit. The resolution of September 30, 1921 (Rec., p. 30), allocating certain lines of activity to the Fleet Corporation, reserves to the Shipping Board itself the governmental functions granted by the Act, and confines its directions to the Fleet Corporation to commercial matters within the purpose of its creation.

So far as this case is concerned, the separation of commerce from government is therefore complete, and the commerce is committed to the separate corporate entity which sent and agreed to pay for the telegrams here in question.

VII. The Authoritative Cases Are Consistent With Respondent's Contentions.

The Lake Monroe (250 U. S., 246, 63 L. Ed., 962), decided June 2, 1919, was an application for a writ of prohibition to prevent the arrest of a ship operated by the Fleet Corporation for damages for a collision. The Fleet Corporation is referred to in general terms as "an operating agency" of the Shipping Board. The Lake Monroe had been requisitioned while in process of construction, completed by the Fleet Corporation, operated by it, documented in the name of the United States and assigned to Randall and Company as operating agents, and at the time of the collision was operating under a charter executed by them as agents of the Shipping Board to a private concern for the carrying of coal in coastwise commerce. This Court concluded:

> "Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the government in the outcome of her voyage.
>
> "We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

United States *vs.* Strang (254 U. S., 491, 65 L. Ed., 368) came up on demurrer to an indictment charging a person with having unlawfully acted as agent of the United States in transacting business for the Fleet Corporation. Mr. Justice McREYNOLDS said:

> "The ultimate question for determination is whether the employment of defendant Strang as an inspector by the United States Shipping Board Emergency Fleet Corporation, without more, made him an agent of the government within the meaning of Sec. 41, Criminal Code."
>
> . . . . . .
>
> "Counsel for the government maintain that the Fleet Corporation is an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation, while performing the duties as inspector, Strang necessarily acted as agent of the United States.
>
> "The demurrer was properly sustained.
>
> . . . . . .
>
> "The Corporation was controlled and managed by its own officers, and appointed its own servants and agents, who became directly responsible to it. Nothwithstanding all its stock was owned by the United States, it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only, and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41.
>
> "Generally agents of a corporation are not agents of the stockholders, and can not contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. Bank of United States *vs.* Planters' Bank, 9 Wheat., 904, 907, 908, 6 L. Ed., 244, 245; Bank of

Kentucky *vs.* Wister, 2 Pet., 318, 7 L. Ed., 437; Briscoe *vs.* Bank of Kentucky, 11 Pet., 257, 9 L. Ed., 709; Salas *vs.* United States, 148 C. C. A., 440, 234 Fed., 842."

Sloan Shipyards Corporation *vs.* U. S. S. B. E. Fleet Corporation and three other cases were decided together May 1, 1922 (258 U. S., 549, 66 L. Ed., 762). The Sloan Shipyards Corporation had filed a bill in equity to set aside a contract alleged to have been illegally extorted from it by the Fleet Corporation. The bill had been dismissed below upon the ground that it was against the Government, and that the suit being for more than $10,000 must be brought in the Court of Claims. This Court held the suit properly maintainable against the Fleet Corporation.

The suit of the Astoria Marine Iron Works, decided with the Sloan Shipyards case, was upon a contract with the Fleet Corporation, "a corporation organized and existing under the laws of the District of Columbia (hereinafter called the 'Corporation'), representing the United States of America, party of the second part." The contract recognized by its terms that the United States might exercise control over the furnishing of supplies to the contractor, and provided that if required by the Fleet Corporation "and/or the United States," the contractor would furnish schedules, etc. This Court held against the Fleet Corporation's contention that the remedy was in the Court of Claims, saying:

> "The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. The judgment in this case also must be reversed."

In the third case decided under the title of Sloan Shipyards Corporation, that of the Eastern Shore Shipbuilding Corporation, Bankrupt, the Court said:

> "It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the district court for the southern district of New York, under a contract similar to that last described, made by that company with the Fleet Corporation, 'representing the United States of America,' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the government of the United States. It was denied successively by the referee, the district court, and the circuit court of appeals, on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed., 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

In the cases in the district courts reversed in the Sloan Shipyards and the Astoria Marine Iron Works cases (268 Fed., 624, and 270 Fed., 635), will be found those arguments based upon some expressions of the court in the Lake Monroe case to the effect that the Fleet Corporation is but "an arm of the Board" which is "an arm of the Government," which are put forward in the case at bar on behalf of the petitioner. The case in this group which was affirmed by this Court, that of Eastern Shore Shipbuilding Corporation, Bankrupt (274 Fed., 893, 899), is consistent with the contentions of the respondent here.

United States vs. Walter (263 U. S., 15, 68 L. Ed., 137), has been relied on by petitioner for the reason that the third count of the indictment in that case was upheld upon the ground that—

> "while it is true that the corporation is not the United States (United States vs. Strang, 254 U. S., 491, 65 L. Ed., 368, 41 Sup. Ct. Rep., 165), the contemplated fraud upon the corporation, if successful, would have

> resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument. We are of opinion that it was within the words of Sec. 37, 'defraud the United States in any manner,' and that on this as on the other point, the decision below was wrong. Haas *vs.* Henkel, 216 U. S., 479, 480, 54 L. Ed., 577, 578, 30 Sup. Ct. Rep., 249, 17 Ann. Cas., 1112; United States *vs.* Barnow, 239 U. S., 74, 79, 60 L. Ed., 155, 157, 36 Sup. Ct. Rep., 19."

We respectfully submit that this holding does not rest upon any fiction of identity of the corporation with its stockholder, the government. In concluding that a loss to the corporation would result directly in loss to the United States, the court merely applied a principle as old and familiar as the principle that a stockholder has an insurable interest in the property of a corporation, as to which see Riggs *vs.* Commercial Mutual Insurance Company (125 N. Y., 7), decided in 1890, and 26 C. J., 24, and numerous cases cited under note 53. In concluding that the impairment of the efficiency of the Fleet Corporation should be construed as an element in the crime of defrauding the United States "in any manner," the cases cited show what the court had in mind. Haas *vs.* Henkel is the Cotton Leak case where the result of the conspiracy would have been the obtaining in advance of information concerning government reports, and would have resulted in no loss whatsoever to the government, but only in depriving the reports of their value to the public. It appears to be true that the opinion as to the third count of the indictment ascribes a liberal instead of a strict meaning to the phrase "defrauding the United States in any manner," in a criminal statute; but that does not help the petitioner in its effort to establish that the Fleet Corporation is the United States.

The first and second counts of the indictment in the Walter case were based on Section 35 of the Criminal Code

as amended October 23, 1918 (40 Stats. at Large, 1015), as follows:

> "Whoever shall make . . . to . . . any person or officer in the civil, military or naval service of the United States, *or any department thereof, or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder, knowing*," etc. . . .

The italicized phrases were added by the amendment of 1918, showing a clear recognition by Congress of the fact that such a corporation as the petitioner was not a part of the government nor a Department of the government.

When we contrast the phraseology of this statute as amended with the phraseology of the statute which is under consideration in the case at bar, the Post-Roads Act of 1866 granting reduced rate telegraphing to the "several departments of the government and their officers and agents," it is evident that the language of the Act of 1918 above quoted furnishes an additional and persuasive argument for the respondent herein—the argument of *Expressio Unius*.

U. S. ex rel. Skinner and Eddy Corporation vs. McCarl (72 L. Ed., Advance Sheets, 13), decided October 10, 1927, has been quoted from before. This case seems conclusive against any contention that the corporate treasury of the Fleet Corporation is to be confused with the United States Treasury, or that the liabilities of the Fleet Corporation are debts in which the United States has a (legal) interest as debtor.

Since the decision of this court in the Sloan Shipyards cases, there has been uniformity of holding by the Circuit Courts of Appeals that the Fleet Corporation is liable for torts and breaches of contract as are other private corporations.

> Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed., 641 (C. C. A., 2).

Dietrich *vs.* U. S. S. B. Emergency Fleet Corporation, 9 Fed. (2d), 733 (C. C. A., 2).

U. S. S. B. Emergency Fleet Corporation *vs.* Banque Russo-Asiatique London, 286 Fed., 918 (C. C. A., 3).

U. S. S. B. Emergency Fleet Corporation *vs.* Texas Star Flour Mills, 12 Fed. (2d), 9 (C. C. A., 5).

Cohn *vs.* United States Shipping Board et al., 20 Fed. (2d), 56, (C. C. A., 6).

U. S. S. B. Emergency Fleet Corporation *vs.* Rosenberg Bros. & Co., 12 Fed. (2d), 721 (C. C. A., 9).

And in the State courts:

Cox *vs.* Lykes Bros., 237 N. Y., 376, 143 N. E., 226.

Haynes *vs.* Lone Star Shipbuilding Co., 268 Pa., 92, 110 Atl., 788.

VIII. Telegraphic Rates When Established Have the Force of Law, and a Telegraph Company's Alleged Agreement, Express or Implied, Can Not Prevail Against the Legal Rate.

In the statement by the petitioner (brief, p. 8), is set out the fact that the Government rate was allowed by the respondent to the Fleet Corporation until May 23, 1922, at which time it is emphasized that it was first denied.

Considerable space is given also to the enumeration of the various governmental and quasi-governmental organizations to which the rate has been extended, including the petitioner.

It is stipulated in this connection that these extensions of the Government rate and priority were "permitted" by the telegraph company "upon application for the said Government rate made by them or on their behalf, as a matter of course, and without litigation in the courts or other final determination of the legality of the claims for Government rate" (Rec., p. 19).

Perhaps by inadvertence, or by reason of the unimportance of the telegraphing of some of these organizations, mistakes have been made and the Government rate extended to bodies which were not entitled to it.

Even so, such a course of dealing on the part of the telegraph company can hardly be claimed to amount to a contract binding, or purporting to bind, the telegraph company to continue to accord these organizations the Government rate forever.

As a matter of law, however, even by express acquiescence or solemn agreement on the part of the respondent, the legal rate applicable to the messages of the Fleet Corporation could not be set aside and the preferential rate substituted. Irrespective of its past conduct or its present wishes, the respondent is legally bound to apply the ordinary commercial rate to the petitioner's messages, if the petitioner is what is purports to be, a corporation engaged in commerce, and as such engaged in active competition with others engaged in like commerce who pay full rates for their telegrams.

Since 1910 telegraphic rates have not been a matter of private contract, but have the force of law. See Western Union Telegraph Company vs. Esteve Brothers and Company (256 U. S., 566, 65 L. Ed., 1094) a case in which a message was not written when filed for transmission upon the usual telegraphic blank specifying the classes of service and limitations of liability. This court said:

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons. . . . Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. . . . Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all. . . ."

IX. Even Assuming the Fleet Corporation to be a Government Department, Which this Court Has Said it is not, Some Messages Here Involved Were Not "Between" it and Another, and Therefore Not Within the Statute.

It is set out in paragraph 8 of the agreed statement (Rec., p. 7), that of the messages involved (1) some were

messages between it and its agents or between it and some branch of the government, and (2) some were messages between it and its agents, on the one hand, and persons or corporations not its agents or those of any branch of the government, on the other hand. The amount of the tolls calculated at commercial and government rates on each of these classes of messages separately is set out in the agreed statement.

It appears obvious that a telegram from a Department of the government or its agent to an outsider, or from an outsider to a Department or its agent, is not a telegram "*between* the several Departments of the government and their officers and agents." The statute contemplates a message the origin and destination of which shall both be governmental.

Attorney General WILLIAMS under date of July 10, 1873, in an opinion to the Postmaster General upon this statute (14 Opinions, Attorney General, 278, 279, 280), said:

> "I think that the word 'between' in said section should be taken distributively, as applying to communications between, first, one Department and another; second, a Department and its officers and agents; third, a Department and the officers and agents of another Department; fourth, the officers and agents of the same Department; and, fifth, the officers and agents of one and those of another Department. This construction is, in my judgment, in conformity with the reason of the statute."
>
> . . . . . .
>
> "My opinion, therefore, is that the Departments, their officers and agents, may interchangeably telegraph each other, as hereinbefore stated, upon official business, subject only to the limitation that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures."

Therefore, irrespective of the court's view upon the principal question in the case, recovery should in any event be had for the difference between the government rate and the commercial rate upon the messages passing between the Fleet Corporation and persons outside of the government;

this even upon the assumption that the Fleet Corporation is a Department of the government.

The petitioner admits that if the statute were to be construed *de novo*, this claim of respondent would have force. It is a fact, however, that the present case is the first one, excepting the Philippine Bank case above referred to, in which this statute has been before the courts for construction. The question is, therefore, unembarrassed by any prior decisions. The petitioner refers to the same opinion of the Attorney General, which is quoted above, as laying down a rule of law which has been for many years accepted. (Brief, p. 30.) The opinion seems consistent only with our position in this matter.

On the merits, the petitioner's argument seems to be solely that the purpose of the statute was to save money for the public treasury, and inasmuch as more money would be saved by assuming that the statute read "to or from" instead of "between," it should be so construed. (Id., pp. 30-31.)

What the practice has been does not appear in the record, contrary to petitioner's assumption about this. It is obvious that if the Government rate were to be extended to such corporations as the petitioner, it would be all the more vital for the telegraph company to protect itself by insisting that no messages not strictly within the statute as to both origin and destination shall be sent at the preferential rate. Indeed, as we have heretofore pointed out (p. 43), if the law does not *require* the government rate to be applied, the telegraph company is obliged to collect the regular rate, and no amount of past practice, whether mistaken or intentional, can vary its obligation. (Western Union vs. Esteve Bros., supra, p. 44).

It is respectfully submitted that the judgment of the court below was correct and should be affirmed.

JOHN W. DAVIS,
FRANCIS R. STARK,
PAUL E. LESH,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 113.—October Term, 1927.

United States Shipping Board Emergency Fleet Corporation, Petitioner, *vs.* Western Union Telegraph Company. } On Certiorari to the Court of Appeals of the District of Columbia.

[January 3, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

By Post Roads Act, July 24, 1866, c. 230, 14 Stat. 221; Rev. Stat. §§ 5263-5266, the United States offered privileges of great value to any telegraph company which should elect to accept its provisions. In return, it required, by § 2 of the Act: "That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General." Each year since the passage of the Act the government rates have been so fixed. For the fiscal years beginning July 1, 1921 and July 1, 1922, they were fixed for domestic telegrams substantially at 40 per cent of the commercial rate; and for cablegrams at 50 per cent of the commercial rate.

The Western Union accepted the provisions of the Act on June 8, 1867. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 4; *Telegraph Co.* v. *Texas*, 105 U. S. 460. The Fleet Corporation was organized April 16, 1917. From that date to May, 1922, it was accorded, without question, the government rate on all messages sent by it. Then the Western Union claimed the right to the commercial rates for all its messages. The claim was resisted. Thereafter, messages of the Fleet Corporation continued to be marked by it "Government rate"; but they were received under an agreement that the acceptance of the message and of payment therefor at the government rate should be without prejudice to the

right of the Western Union to recover the additional amount claimed. This suit was brought, in the Supreme Court of the District of Columbia, to recover, for the months of June and July, 1922, the difference between the amount paid and the commercial rate. Of this amount, $1,071.16 was for messages sent to some official or agent of the Fleet Corporation or of the Shipping Board or to some other department or official of the Government; $336.43, for messages addressed to private persons. A stipulation waiving the jury was filed; the case was heard on an "Agreed Statement of Facts"; the court found the facts to be as there stated; and a judgment entered for the full amount was affirmed by the Court of Appeals for the District. 13 F. (2d) 308. This Court granted a writ of certiorari, 273 U. S. 681.

The question whether messages transmitted for the Fleet Corporation after May 31, 1922, shall be paid for at the commercial rates or at the lower government rates is one of statutory construction. The Post Roads Act had been in force, without amendment, more than 55 years before the transactions here involved. Throughout that period, the rights of the Government and the Western Union concerning the transmission of messages had been governed by the Act, unaffected by any special contract; and there had been a uniform practice in applying it. That practice should be stated before discussing the specific facts relating to the Fleet Corporation. For the construction given to the Act by the United States and acquiesced in by the Western Union, having been both contemporaneous and thereafter consistently and widely applied, is not only persuasive but, in our opinion, decisive of the case. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. Compare *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510.

Continuously since June 8, 1867, the Western Union has extended the right of priority in transmission and the government rate, not only to each of the great Executive Departments presided over by a member of the Cabinet (and to the several bureaus, divisions and officers thereof), but also to the Judicial and the Legislative branches, to the government of the District of Columbia, and to the following corporations existing at the time of the passage of the Post Roads Act: the Smithsonian Institution, organized pursuant to Act of August 10, 1846, c. 178, 9 Stat. 102, and the National Home for Disabled Volunteers, organized pursuant to Acts of March 8, 1865, c. 91, 13 Stat. 509, and March 21, 1866, c. 21,

14 Stat. 10. The Western Union has also extended, from time to time, the same preferences to at least the folowing minor independent departments established after the date of the acceptance by it of the provisions of the Post Roads Act: Civil Service Commission, Act of January 16, 1883, c. 27, 22 Stat. 403; Interstate Commerce Commision, Act of February 4, 1887, c. 104, 24 Stat. 379, 383; Bureau of American Republics (now the Pan-American Union), Act of July 14, 1890, c. 706, 26 Stat. 272, 275; Panama Canal, Act of April 28, 1904, c. 1758, 33 Stat. 429; Federal Reserve Board, Act of December 23, 1913, c. 6, 38 Stat. 251, 260; Federal Trade Commission, Act of September 26, 1914, c. 311, 38 Stat. 717; Inter-American High Commission, United States Section, Act of February 7, 1916, c. 20, 39 Stat. 8; Bureau of Efficiency, Act of February 28, 1916, c. 37, 39 Stat. 14, 15; United States Shipping Board, Act of September 7, 1916, c. 451, 39 Stat. 728, 729; United States Employees' Compensation Commission, Act of September 7, 1916, c. 458, 39 Stat. 742, 748; United States Tariff Commission, Act of September 8, 1916, c. 463, 39 Stat. 756, 795; Federal Board for Vocational Education, Act of February 23, 1917, c. 114, 39 Stat. 929, 932; Alien Property Custodian, Act of October 6, 1917, c. 106, 40 Stat. 411, 415; United States Railroad Administration, Act of March 21, 1918, c. 25, 40 Stat. 451, 455; War Finance Corporation, Act of April 5, 1918, c. 45, 40 Stat. 506; United States Interdepartmental Social Hygiene Board, Act of July 9, 1918, c. 143, 40 Stat. 845, 886; Railroad Labor Board, Act of February 28, 1920, c. 91, 41 Stat. 456, 470; Federal Power Commission, Act of June 10, 1920, c. 285, 41 Stat. 1063; General Accounting Office, Act of June 10, 1921, c. 18, 42 Stat. 20, 23; Veterans' Bureau, Act of June 7, 1924, c. 320, 43 Stat. 607, 608. So far as appears by the record, there has been no denial of the government rate at any time to any department, office, or division of the Government as organized, except that to the Fleet Corporation here in question.

The extension of the government rate to each of the above named departments was made by the Western Union, as a matter of course, upon application therefor by the Government and has been continued ever since. The government rate was applied to all messages sent on official business of the Government and chargeable to any of the departments named, whatever the nature of its organization, whatever its functions, and whatever the character of the official business. In extending priority and the lower rates, no

distinction has ever been made between messages sent to persons within the several departments and those outside. And, obviously, the importance to the United States of securing both priority and the lower rate for official messages sent by it, is the same whoever the addressee. Messages sent by the Government, but not on official business exclusively, have been paid for by the private person interested; and the payment has been made at the commercial rate.[1]

The Western Union has never questioned the right of the Shipping Board to the government rate on any official messages sent by it. It concedes that all the messages here in question relate to activities which the Shipping Board itself might legally have conducted; that all the messages were sent on its official business; that the Board was authorized by Congress to employ the Fleet Corporation as its agency to perform the particular activities in connection with which they were sent; that the messages were not to be paid for out of any segregated portion of Fleet Corporation money; that payment of the commercial rates would involve, indirectly, an additional charge on the public treasury; and that, so far as concerns the character of the message or of the business, the government rate was chargeable for all the messages, if for any of them. The claim that the government rates do not apply to messages of the Fleet Corporation is rested in part upon the fact that it is, in form, a private corporation; in part upon the fact that it is an agency of the Shipping Board, as distinguished from a bureau or division; in part upon the fact that, to a considerable extent, it is engaged in a business which involves competition with private ship owners. These arguments do not support the claim; but they make necessary a statement of the facts concerning the organization and activities of the Fleet Corporation.

The Fleet Corporation was organized by the United States Shipping Board pursuant to specific authority conferred by the

[1] Thus, a Treasury Regulation, adopted April 2, 1918, provides: "(10) Government telegraph rates, established conformably to law, are intended to apply to official Government business exclusively, and no private individual, association, company, or corporation should in any way be benefited thereby. In cases where it becomes necessary to use the telegraph on any business in the special interest of any private person or persons, in which the Government has no interest, the party for whom the service is performed will be required to pay for the messages both ways at commercial rates." T. D. 37588.

Act of September 7, 1916, c. 451, § 11, 39 Stat. 728, 731. The legislation concerning it, its relation to the Shipping Board, its character and the scope of its activities are shown in *The Lake Monroe*, 250 U. S. 246; *United States* v. *Strang*, 254 U. S. 491; *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549; *United States* v. *Walter*, 263 U. S. 15; and *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. —. Besides powers conferred upon the Fleet Corporation by the general corporation law of the District of Columbia, it was vested, by delegation from the President, with the powers conferred upon him by Acts of June 15, 1917, c. 29, 40 Stat. 182; April 22, 1918, c. 62, 40 Stat. 535; and November 4, 1918, c. 201, 40 Stat. 1020, 1022. Executive Orders, No. 2664, July 11, 1917; No. 2888, June 18, 1918; No. 3018, December 3, 1918; No. 3145, August 11, 1919. These specific powers and duties were transferred to the Shipping Board by Merchant Marine Act, 1920, June 5, 1920, c. 250, 41 Stat. 988.

Since the passage of the Merchant Marine Act, 1920, the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions. The activities have consisted largely of maintaining and liquidating property acquired for the United States during the World War, of settling claims arising therefrom, and of operating, or causing to be operated, vessels not disposed of. Besides other activities, the Fleet Corporation has operated directly, and has been interested in the operation of, vessels owned by the United States. Some of these government vessels have been operated in competition with American vessels privately owned. But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

First. It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is

such. But all of its $50,000,000 capital stock was subscribed and paid for by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business. The Fleet Corporation has, of course, received from others moneys in payment for property sold, as charter hire, for shipping services, or in settlement of claims. But, as the business of the Fleet Corporation has been conducted continuously at a large loss, the sums so received did not supply capital. They served merely to reduce, to that extent, the amount of the deficit being incurred and, hence, the amount of the additional money which the United States was required to contribute.[1] Payment by the Fleet Corporation of the commercial rate for messages would necessarily increase the charges upon the public treasury to the same extent, and in the same manner, as would the charge of the commercial rate in respect to the business done for the United States directly by the Shipping Board or that done for it by some other department of the Government. An important, if not the chief, reason for employing a corporate agency was to enable the Government to employ commercial methods and to conduct the operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure and with its control over the financial operations of the United States. *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. —. It obviously was not the intention of the Government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rate secured through the Post Roads Act.

Second. It is argued that in sending a message the Fleet Corporation contracted on its own behalf; that this contract gave to the Western Union the right to sue the corporation; and that by such

[1] For the fiscal year ending June 30, 1921, the Shipping Board reported a total excess of outgo over income (exclusive of appropriations) of $188,291,441.05. Annual Report of United States Shipping Board, 1921, p. 321. For the year ending June 30, 1922, the Board's excess was $50,374,951.22; that of the Fleet Corporation, $81,547,600.86. Annual Report, 1922, p. 238. In the year ending June 30, 1923, the excess for the Shipping Board and all its subsidiaries was $15,231,630.30; that for the Fleet Corporation taken alone, $41,682,514.86. Annual Report, 1923, p. 168.

contract there was secured the right to rely upon the credit of the corporation and to satisfy the debt out of its properties. All this may be admitted; but it affords no reason for denying that the Fleet Corporation is a department of the United States within the meaning of the Post Roads Act. Actually, the Fleet Corporation had no individual credit. As an agency of the Shipping Board it had control of certain properties and moneys required in the conduct of its business. But it had no actual capital. Long before June 1, 1922, the $50,000,000 which the United States supplied in payment of the capital stock, had been sunk in the business.[3] By, and pursuant to, Merchant Marine Act, 1920, the title to most of the property used by the Fleet Corporation was transferred to the Shipping Board or to the United States. All moneys other than amounts needed for current operation are required to be covered into the Treasury of the United States. The Fleet Corporation has had no means of paying either the large outstanding claims against it or of paying the deficits continuously being incurred, other than the moneys supplied by the United States through the annual appropriations. It is, of course, immaterial that the charge upon the public treasury is an indirect one; and the fact that the Fleet Corporation receives some gross income from shipping services is also without legal significance. Many departments receive fees, or some other form of compensation, for services rendered to private persons. See 14 Opinions of the Attorney-General, 278.

Third. It is argued that the Fleet Corporation should be denied the government rate, because it competes, in respect to some of its operations, with private shipping. But in operating ships it is performing a function of the Government. The conduct of business in competition with private interests may of course, be for a public

[3]The total receipts from appropriations and allotments to June 30, 1921, were $3,310,170,576.98. The net assets then on hand (after deducting current and capital liabilities, reserves for depreciation, etc.) were $1,929,847,381.84. Thus, the loss to date, as estimated by the Shipping Board, was $1,380,323,195.14. Annual Report of United States Shipping Board, 1921, pp. 309-321. By June 30, 1923, the total appropriated and allotted had grown to $3,491,912,648.01, while the Shipping Board's estimate of the net worth of the assets belonging to it and its subsidiaries had shrunk to $292,405,200.17, showing a loss of $3,199,507,447.84. Annual Report, 1923, pp. 192-196. The estimates for June 30, 1927, show a net worth of $290,461,593.91, making a net loss of $3,271,021,167.61 on the total appropriations ($3,561,482,761.52) to that date. Annual Report, 1927, pp. 121-124.

purpose, *Standard Oil Co.* v. *City of Lincoln*, No. 91, decided December 5, 1927. Other departments which compete with private business have long enjoyed the government rate without question. The Post Office has since 1872 competed with bankers through money orders; since 1910 with savings banks by receiving deposits on interest; since 1913 with express companies through the parcel post. The War Finance Corporation has since 1918 competed with the private bankers. The War Department has by its Mississippi River barge lines competed since 1920 with the railroads. Equally with all of these, the Fleet Corporation is acting for and on behalf of the United States.

Fourth. It is faintly argued that the Western Union is entitled to the commercial rates, because, since the Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544, which broadened the scope of the Act to Regulate Commerce so as to include telegraph companies, telegraph rates are no longer a matter of contract; that they have the force of law, *Western Union Telegraph Company* v. *Esteve Brothers & Co.*, 256 U. S. 566; and that any deviation from the lawful rate would involve an undue preference to the Government and an unjust discrimination against its competitors, the private shipping concerns. It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates. Compare *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318. But it is a sufficient answer to say that it clearly was not the intention of Congress by the Act of 1910 to abrogate or modify the scope or affect the application of the Post Roads Act.

Fifth. It is urged that if the Fleet Corporation is granted the government rate, it may likewise be claimed by every instrumentality of the Government. Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest. Compare *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907. The Fleet Corporation is entitled to the government rate, not because it is an instrumentality of the Government, but because it is a department of the United States within the meaning of the Post Roads Act. In respect to messages sent, on the Government's business, no distinction can properly be made between those of the Shipping Board and those of the Fleet Corporation.

Reversed.